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No. (1)

Supreme Court, U.S.
FILED
07-565 OCT 25 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AUDUBON INDEMNITY INSURANCE GROUP,

Petitioner,

v.

CORA MAES,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. With respect to *punitive* damages, does it violate due process of law, as guaranteed by the Fourteenth Amendment, for a state supreme court to expose a defendant to such damages retroactively by (i) announcing a new rule of law that substantially reduces a previously available defense, (ii) applying that rule to an incomplete record, and (iii) denying the defendant the opportunity to present evidence on remand that it qualifies for the defense under the new rule?

2. With respect to *compensatory* damages, does it violate due process of law, as guaranteed by the Fourteenth Amendment, for a state supreme court to expose a defendant to such damages retroactively by (i) announcing a new rule of law that substantially reduces a previously available defense, (ii) applying that rule to an incomplete record, and (iii) denying the defendant the opportunity to present evidence on remand that it qualifies for the defense under the new rule?

LIST OF PARTIES

- The petitioner is Audubon Insurance Group (a/k/a Audubon Insurance Indemnity Group in this litigation), the name under which business is jointly conducted by Audubon Indemnity Company, a Mississippi corporation, and Audubon Insurance Company, a Louisiana corporation. Audubon Indemnity Company is a wholly-owned subsidiary of Audubon Insurance Company, which is, in turn, a wholly-owned subsidiary of NHIG Holding Corp., a Delaware corporation. NHIG is a wholly-owned subsidiary of American International Group, Inc., also a Delaware corporation and the publicly-traded, ultimate parent of the petitioner.
- The respondent is an individual, Cora Maes.

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PETITION FOR WRIT OF CERTIORARI

The petitioner – Audubon Indemnity Insurance Group ("Audubon") – respectfully petitions the Court for a writ of certiorari to review the judgment of the Supreme Court of New Mexico, which retroactively exposed the petitioner to punitive and compensatory damages while denying the petitioner the opportunity to present evidence in its defense.

OPINIONS BELOW

There are four opinions below related to the questions presented by this petition. In chronological order, they are as follows:

- In 2004, the Eighth Judicial District Court of New Mexico ("the trial court") denied Audubon's motion to dismiss on grounds of statutory immunity. This unpublished decision is reproduced in the Appendix at App. 43-44.

- In 2005, the Court of Appeals of New Mexico reversed the trial court and held that, as an agent of a state-sponsored insurance plan, Audubon was statutorily immune from suit in the case at bar. This decision is published as *Maes v. Audubon Indem. Ins. Group*, 127 P.3d 1126 (2005), and is reproduced at App. 22-42.

- On June 15, 2007, the Supreme Court of New Mexico reversed the Court of Appeals and remanded the case back to the trial court. In so ruling, the state

supreme court held that the state-sponsored insurance plan must "control" Audubon in order for Audubon to be its agent and that, under this test, Audubon was not its agent and, thus, not entitled to immunity. This decision is published as *Maes v. Audubon Indem. Ins. Group*, 164 P.3d 934 (2007), and is reproduced at App. 1-21.

- On July 27, 2007, the Supreme Court of New Mexico denied the motion for rehearing by which Audubon sought the right to present evidence on remand to show that it meets the new "control" standard for agency. This unpublished decision is reproduced at App. 45-46.

JURISDICTION

The decision of the Supreme Court of New Mexico was entered on June 15, 2007. The decision of the Supreme Court of New Mexico denying Audubon's motion for rehearing was entered on July 27, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case arises under the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part, that "[n]o State shall . . .

deprive any person of . . . property without due process of law. . . ."

Also implicated is the New Mexico FAIR Plan Act (fair access to insurance requirements), codified at N.M. Stat. Ann. §§ 59A-29-1 to -9. Among the provisions of the FAIR Plan Act pertinent to this appeal is the following assurance of immunity:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees . . . for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

N.M. Stat. Ann. § 59A-29-7. The FAIR Plan Act is reproduced in its entirety in the Appendix at App. 47-50.

STATEMENT OF THE CASE

Background

Like many States, New Mexico has enacted legislation to provide access to insurance for property owners whose "risks would be unprofitable for an insurance company to assume on a voluntary basis." App. 3 (state supreme court decision) (citing R. Russ & Thomas F. Segalla, *Couch on Insurance* §§ 1:27, 4:6 (3d ed. 2005)). Every insurance company that is licensed to transact property insurance in New Mexico is required to become a member of the FAIR

Plan and its underwriting association, the New Mexico Property Insurance Program ("NMPIP" or "the Association"). Audubon is a member of the Association. Audubon also plays another role. Because the FAIR Plan is a very, very small operation, it contracts with Audubon – as its servicing insurer – to issue the policies and service them. *See* App. 30-31 (state court of appeals) ("[B]ecause, under the Plan's bylaws, the Plan itself does not issue insurance policies, the Act necessarily contemplates that the Plan will contract with a servicing insurer who will issue and service policies."); App. 4-5 (state supreme court) (describing operation of FAIR Plan).

The Maes Policy and Fire

As an owner of high risk property, the plaintiff – Cora Maes – applied for insurance through the FAIR Plan and was issued a policy on March 20, 2000. Soon thereafter, on May 2, 2000, a fire completely destroyed a building owned by Ms. Maes and claimed by her to be the insured property. The incident was investigated and the FAIR Plan, acting through Audubon, denied coverage.[1] Ms. Maes then appealed

[1] Although not part of the record of this case or critical to this petition, the reason for the denial was a determination that the policy did not cover the commercial building that burned, but a different, single-family dwelling on the same premises. Letter from C. Braun to D. Sanchez, dated Aug. 2, 2000 (held in record of proceedings, *In re FAIR Plan Act Appeal: Cora Maes v. Audubon Indemnity Ins. Group* (N.M. Supt. of Ins. Docket No. 00-386-IN)).

to the New Mexico Superintendent of Insurance, as provided by law. After a hearing, the Superintendent decided in favor of Ms. Maes in October 2001, ruling that the loss was covered by the FAIR Plan policy. Acting on behalf of the FAIR Plan, Audubon then appealed to the First Judicial District Court (County of Santa Fe), a state court of record. The court affirmed the decision of the Superintendent of Insurance in February 2003, whereupon Audubon promptly paid Ms. Maes $150,000 – her full policy limit.

The Lawsuit

Notwithstanding payment, Ms. Maes sued Audubon in the Eighth Judicial District Court (County of Taos) in September 2003, seeking both punitive and compensatory damages based on allegations that Audubon acted in bad faith in the way it handled her insurance claim. Audubon responded with a motion to dismiss under New Mexico District Court Rule 1-012(B)(6) (failure to state a claim), the state law counterpart of Fed. R. Civ. P. 12(b)(6). In support of its motion, Audubon pointed out that under New Mexico law, it was immune from suit. According to the FAIR Plan Act:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the Association or its agents or employees . . . for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

N.M. Stat. Ann. 59A-29-7; App. 49-50. Briefs were written and the matter argued.

During oral argument, counsel for Ms. Maes sought to make an issue of Audubon's status as an out-of-state corporation:

> Which [sic] basically what I wanted to say is, you know, Florida corporations, California corporations, they can come into New Mexico, they can deny claims, and they can't be sued. And that clearly is not the law.
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> * * *
>
> The fact that a Florida corporation comes and says, "We're immune like the State of New Mexico government, unless you can sue us by authority of legislature." That's not the law in New Mexico, your Honor.

App. 69. Although counsel for Ms. Maes named the wrong States in his attack upon Audubon, he was correct in describing the petitioner as an out-of-state insurance company. His point had no legal relevance but was consistent with the abuse of punitive damages found in some state courts. *See infra* at 15-16, 21-24. At the end of oral argument, the District Court tersely denied Audubon's motion to dismiss, rendering its decision from the bench without explanation and without a written opinion. App. 71.[2]

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[2] Ms. Maes had attached the NMPIP Bylaws and Articles of Association to her brief and asked the trial court to treat Audubon's motion to dismiss as a motion for summary judgment. The

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The Appeal

Invoking the collateral order doctrine, Audubon then pursued an interlocutory appeal, a familiar practice in cases involving the denial of immunity. Taking its case to the New Mexico Court of Appeals, Audubon won a reversal of the district court decision. The court of appeals ruled that Audubon was entitled to statutory immunity because (i) "as the servicing insurer, it is an *agent* of the FAIR Plan," and (ii) the actions challenged by Maes were taken in the performance of its powers and duties under the FAIR Plan. App. 28, 30 (emphasis added).

Ms. Maes then appealed to the New Mexico Supreme Court, where she won a reversal of the court of appeals decision. The state supreme court held that despite its duties as the servicing insurer, Audubon was *not* an *agent* of the FAIR Plan and, thus, not entitled to immunity. In so ruling, the state supreme court applied a new definition of "agent" that went beyond the previously established definition on which the court of appeals had relied.

As the state supreme court explained, the court of appeals had based its decision on the definition of "agent" found in the uniform jury instructions adopted by the state supreme court as an authoritative

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trial court implicitly rejected this suggestion when it ruled from the bench that "the *motion for dismissal* is denied." App. 71 (July 9, 2004 Transcript of Hearing) (emphasis added).

statement of law for use in New Mexico courts.[3] According to that definition:

> An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation. The agreement may be oral or written.

App. 13 (quoting N.M.U.J.I. Civ. 13-401). As the state supreme court also explained:

> The Court of Appeals reasoned that because "Audubon has an agreement with the FAIR Plan to service the policies underwritten by the Plan, and Audubon is paid a fee for doing so[,] . . . Audubon is an agent of the FAIR Plan because it both 'manages some affair' and 'does some service for' the Plan."

App. 13-14 (quoting App. 29).

The state supreme court noted that "[t]he parties agree on this definition of 'agent.'" App. 14. But despite that agreement, and despite its own previous adoption of the uniform definition, that court applied a different standard, saying "we are not persuaded that it provides the full picture of the nature and

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[3] *See In re Withdrawal, Amendment, Revision and Adoption of Uniform Jury Instructions for Civil Cases* (N.M. Sup. Ct., Misc. 8000) (Order, Sept. 17, 1986) (on file, Clerk's Office, New Mexico Supreme Court).

formation of the agency relationship for all purposes." App. 14. Citing no New Mexico court decision – but turning instead to the Restatement (Third) of Agency – the state supreme court raised the bar with a heightened focus on *control* of the agent. With that new standard in hand, the court then turned to the meager record developed for other purposes in connection with the motion to dismiss, and it ruled that "the agreement between the FAIR Plan and Audubon does not evince the *control* necessary to form or constitute an agency relationship." App. 14 (emphasis added). Finding that Audubon did not qualify as the agent of the FAIR Plan, the court then ruled that Audubon could not invoke statutory immunity. The case was then remanded to the trial court for a trial of Ms. Maes' claims against Audubon.

The Denial of Rehearing and the Right to Present Evidence

Audubon was understandably taken aback by this decision. Until the state supreme court issued its opinion, the "control" exercised by the FAIR Plan or the Association was not an issue. Moreover, the proceedings in the trial court had been on Audubon's motion to dismiss for failure to state a claim and, in keeping with the nature of such a motion, a full factual record was unnecessary and had not been

developed.[4] Thus, Audubon filed a motion for rehearing.

Even so, Audubon did not challenge the new definition. Instead, Audubon simply asked for the right to present evidence that, even under the new standard, it qualified as the agent of the Association and, thus, was entitled to invoke statutory immunity. As Audubon explained:

> While the [New Mexico Supreme] Court found [the] evidence insufficient to establish that Audubon served as the agent of the [Association], substantial relevant evidence exists on the issue of agency as defined by the Court, and remand is necessary to allow Audubon to present that evidence to the district court. *Without remand, Audubon would be deprived of the right to present this evidence,* and would thereby be deprived from asserting its statutory grant of immunity under § 59A-29-7. . . .

App. 52-53 (memorandum in support of motion for rehearing). That is to say, having been given notice of

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[4] Instead, the only evidence that was before the Court consisted of (i) the NMPIP Bylaws and the Articles of Association, which were attached by Maes to her response to Audubon's motion to dismiss, and (ii) an affidavit introduced by Audubon in its reply brief stating that the actions Audubon had taken with respect to Maes were in performance of its powers and duties under the FAIR Plan Act (an issue the state supreme court did not reach in light of its finding that Audubon was not the agent of the Association).

the new standard, Audubon asked for the opportunity to be heard – a key component of due process.[5]

This was not simply a theoretical concern. Audubon outlined in detail the facts it expected to show if allowed the opportunity to do so. *See* App. 55-56.[6] If

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[5] It is a basic principle – and obvious to any American jurist – that "[t]he right to present evidence is . . . *essential* to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411 (1969) (emphasis added). Thus, there was no need to say the words "due process" as if they were talismanic. As this Court has explained:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. *No particular form of words or phrases is essential*, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by *clear intendment* that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) (emphasis added) (citing cases); *see also Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590, 599 (1954) (citing 278 U.S. at 67; R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States*, 149 *et seq.* (Wolfson & Kurland eds. 1951)).

[6] The proffered facts included the following highlights:

> That all decisions with respect to the Plaintiff's policy, including the decision to issue the policy, the decision to deny the claim, and the decision to seek resolution of the dispute first through the Superintendent of Insurance, and then through judicial review, were made by the NMPIP, not Audubon, or

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allowed to be introduced, those facts would show that Audubon's actions in this case were subject to the "control" of the Association, thus making Audubon its "agent" under the new standard and, as such, entitled to invoke immunity. Yet, the state supreme court denied the motion for rehearing without explanation. App. 45-46.

As a result, Audubon is now subject to a final order under which it stands exposed to a deprivation of its property – including both punitive and compensatory damages – without ever having been afforded an opportunity to show that it qualifies for immunity under the new standard retroactively imposed upon it.[7] Such a result violates due process of law and, on this basis, Audubon petitions this Court for a writ of certiorari.

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were subsequently ratified by the NMPIP if not pre-approved.

App. 56 (memorandum in support of motion for rehearing).

[7] The decision of the state supreme court, purporting to makes a final ruling that Audubon is not entitled to immunity, is subject to review by this Court under the collateral order doctrine. Articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the collateral order doctrine was given its authoritative formulation in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). There, this Court explained that the doctrine has three elements: "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Id.* at 468. All three elements are met here.

REASONS FOR GRANTING THE WRIT

Summary of Argument

Over recent years, this Court has repeatedly stepped in to police state courts in their imposition of punitive damages. The impetus for such action has been the recognition that taking private property as punishment implicates the due process clause of the Fourteenth Amendment and that, while punitive damages are not categorically forbidden, state court proceedings that impose such punishment must comply with the requirements of due process – both substantively and procedurally. This is another such case.

Here the due process problem is procedural. Audubon is exposed to the deprivation of its property – under the rubric of punitive damages – without ever having been afforded the opportunity to present evidence that it meets the new, retroactively-broadened standard by which liability is imposed. The petitioner has been given notice (albeit belatedly), but not the opportunity to be heard.

Thus, the decision below is inconsistent with at least two decisions by this Court. In *BMW of North America v. Gore,* 517 U.S. 559 (1996), this Court made it clear that retroactive judicial expansion of liability for punitive damages implicates the Due Process Clause. And last term, in *Philip Morris USA v. Williams,* No. 05-1256, ___ U.S. ___, ___, 127 S.Ct. 1057, 1063 (2007), this Court explained that a party defending against a punitive damages claim must be

provided "an opportunity to present *every available defense*." Given the contradiction between these two decisions and decision below – and given the recent date of the *Philip Morris* case – Audubon asks the Court to grant certiorari, summarily vacate the decision below, and remand for reconsideration in light of the principles enunciated in *BMW* and *Philip Morris*.

This is an issue of concern not only for Audubon. This particular change in New Mexico law may catch no one else, just as the excessive jury award in *BMW* was of immediate concern to no one other than the parties to that case. But, just as the Court saw the *BMW* verdict as symptomatic of a potentially larger problem, so too the decision to deprive Audubon of the right to present evidence suggests a more widespread problem of state court proceedings that catch defendants by surprise and take their property without due process.

In the alternative, certiorari should be granted and this case heard on its merits. Indeed, this case provides the Court an ideal opportunity to address the implications of due process for retroactive exposure to *compensatory* damages, an important issue this Court has not yet squarely addressed. Moreover, because Audubon seeks only the right to be heard, this case does not require the Court to address what may be thornier issues presented in the compensatory damages context by the notice component of the due process.

Certiorari should be granted.

I. THE NEW MEXICO SUPREME COURT'S RULING VIOLATES THIS COURT'S PRECEDENTS ON PUNITIVE DAMAGES AND DUE PROCESS.

This is not a complicated petition. The first question presented implicates an area of constitutional concern that this Court has repeatedly recognized as meriting its attention. For more than a decade, this Court has worked to develop a body of jurisprudence to place reasonable limits – both substantive and procedural – on the award of punitive damages in civil cases. Yet, state courts often have been slow to recognize and apply these principles. The decision below is an example of that hesitation. By retroactively changing the standard for liability – and then denying Audubon the right to present evidence – the state supreme court "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10.

A. State Courts Need Guidance on the Requirements of Due Process as They Relate to Punitive Damage Awards.

For many years, "[t]his Court and individual Justices . . . expressed doubts about the constitutionality of certain punitive damages awards." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991). Such doubts were first expressed in cases where – for one reason or another – the Court found it inappropriate to reverse

such an award.[8] At the same time, however, the Court did not hesitate to identify some of the broad principles by which such awards ultimately would be judged, saying:

> [D]ue process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or *if it was reached in proceedings lacking the basic elements of fundamental fairness.*

Pacific Mutual, 499 U.S. at 9 (emphasis added) (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)). In large measure, the Court's disquiet has been the result of "an explosion in the frequency and size of punitive damages awards." *Pacific Mutual*, 499 U.S. at 61 (O'Connor, J., dissenting) (citing RAND Institute for Civil Justice, M. Peterson, S. Sarma & M. Shanley, Punitive Damages – Empirical Findings iii (1987)). *See also Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part) (noting the "skyrocketing" of punitive damage awards).

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[8] *See, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

B. The Decision Below Violates Due Process by Retroactively Changing the Standard by Which Exposure to Punitive Damages Is Determined and Then Denying Petitioner the Opportunity to Show That It Meets the New Standard.

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court explained that, in the criminal context, the same prohibition against retroactivity that restricts a state legislature also restricts a state supreme court, albeit under a different constitutional provision:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by *judicial construction*.

Id. at 353-54 (emphasis added). In *Bouie*, this Court applied the notice component of due process to prevent the retroactive judicial expansion of a criminal trespass statute. However, it was not yet clear whether a similar constitutional prohibition against retroactivity would apply in a civil suit for punitive damages. *See, e.g., Landgraf v. Usi Film Prods.*, 511 U.S. 244, 281 (1994) (noting that "[r]etroactive imposition of punitive damages would raise a serious constitutional question" but declining to entertain that

question because the statute at issue in that case did not "explicitly authorize[] punitive damages for preenactment conduct").

Later, in *BMW*, the Court was confronted with a civil suit in which a state supreme court had retroactively applied a new rule of law that subjected the defendant to an award of punitive damages. Invoking due process concerns, this Court overturned that award. Writing for the Court, Justice Stevens explained:

> The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause . . . is implicated by civil *penalties.*

BMW, 517 U.S. at 575, n.22 (emphasis in original) (relying on *Bouie* for the proposition that "retroactive application of new construction of statute violated due process"). By the decision below, the state supreme court committed variations of the due process violation identified by this Court in *BMW*. Those violations began when the Court below retroactively and unforeseeably altered the standard by which statutory immunity is measured.

The change was unforeseeable for a variety of reasons. First, that state supreme court did not rely on any of its own precedents in explaining its decision. Second, the interpretation of the term "agent" as used by the state supreme court went beyond the

definition that court already had promulgated when it adopted the New Mexico Uniform Jury Instructions. Third, it was not foreseeable that the motion to dismiss for failure to state a claim – which supposedly turns on a matter of law – ultimately would lead to an appellate court's *factual finding* that Audubon was not an agent of the FAIR Plan. Such a departure from the norms of civil procedure was especially unpredictable in that the trial court record contained virtually no evidence on the degree of control exercised over Audubon by the Association.

Insofar as punitive damages are concerned, there was a due process violation under *BMW*. Even so, Audubon seeks less protection than what *BMW* commands. The point of the petition is not that the state supreme court retroactively reduced Audubon's immunity – and correspondingly expanded its liability – by changing the rules under the FAIR Plan Act. The point is that the state supreme court did so without affording Audubon the right to present evidence that it meets the new standard. This, too, is a violation of due process.

C. The Decision Below Conflicts with This Court's 2007 Decision in *Philip Morris.*

The case implicates another requirement of due process articulated by this Court with respect to punitive damages, but overlooked by the state supreme court. A few months ago, the Court explained

that, even in the context of a civil suit, "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present *every available defense.*'" *Philip Morris USA v. Williams,* No. 05-1256, ___ U.S. ___, ___, 127 S.Ct. 1057, 1063 (2007) (emphasis added) (quoting *Lindsey v. Normet,* 405 U.S. 56, 66 (1972)). Drawn from the criminal law, this fundamental principle was applied last term in a civil case to protect a corporate defendant from being subjected to punitive damages without due process of law. The same principle applies here and in much the same way.

Indeed, the principle articulated in *Philip Morris* applies here in a context that is even more compelling. In *Philip Morris,* the defendant was threatened with punishment for injuring a broad class of nonparty victims where it had no meaningful opportunity to present evidence to distinguish the nonparties from the plaintiff at hand. There was, however, at least the chance for Philip Morris to present "every available defense" as to why the plaintiff *at hand* was not entitled to punitive damages. In the case at bar, even that basic opportunity has been denied Audubon. By refusing to let Audubon present evidence showing that it qualifies for statutory immunity under the retroactively imposed standard, the state supreme court has deprived the petitioners of the "opportunity to present every available defense."

Coming only a few months before the decision below, the *Philip Morris* decision was perhaps too

recent to be recognized as relevant to Audubon's plea for the right to present evidence on remand. Even so, it should now be clear that – at least insofar as *punitive* damages are concerned – the state supreme court violated the Due Process Clause when it refused to allow Audubon to present evidence in the trial court on the question of control.

D. As Exemplified by This Case, the Prevalence of Punitive Damages Awards – Especially Against Insurers – Is a Matter of National Concern.

> ***"I'm not the only appellate judge in America who wants to sleep at night. As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so.***
>
> ***"Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me."***

R. Neely, *The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts* 4 (1988).

By this candid statement, an elected Justice of the West Virginia Supreme Court, Richard Neely, pointed out the view taken by some elected state court judges toward out-of-state defendants. The point is not to attribute such views to the members of the court below, but to underscore the continuing

nationwide need for this Court to police issues of punitive damages.

The skyrocketing of punitive damages awards noted by Justices O'Connor and Stephens in *Browning-Ferris* in 1989 has continued. According to a 1997 study by the RAND Institute for Civil Justice, punitive damage awards are especially prevalent in disputes involving financial injury – rather than personal injury – including disputes involving the *insurance* industry. As explained by RAND: "*Almost half* of all punitive damage awards were made in cases in which the damages were *financial in nature*, rather than personal." RAND, Research Brief, "Punitive Damages Awards in Financial Injury Jury Verdicts," *available at* http://www.rand.org/pubs/research_briefs/RB9028/index1.html (last visited Oct. 13, 2007) (emphasis added). In a finding directly pertinent to the case at bar, the study found that punitive damage awards are far more likely to be found in *financial injury* verdicts than in other verdicts:

> While punitive damages are awarded in less than 4 percent of all civil jury verdicts, there is a *1-in-7 chance* of a punitive award in disputes arising from contractual or commercial relationships, including, for example, disputes stemming from *insurance* or employment contracts or from unfair business practices.

Id. (emphasis added).

The suggestion that insurance companies are specially targeted for punitive damages awards is consistent with the experience of this Court, where insurance companies often have been forced to petition for relief in cases where punitive damages have been at issue. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (reversing Utah Supreme Court on grounds that punitive damages award was irrational, arbitrary and unconstitutional deprivation of the property of the insurer); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (vacating judgment of Alabama Supreme Court against insurer because state supreme court justice had filed similar actions against insurers). Of course, not all punitive damage/insurer cases heard by this Court lead to decisions in favor of the insurer. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (affirming award of punitive damages); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (same). Yet the fact that insurance companies attract a disproportionate number of cert-worthy state punitive damage awards highlights the role of this Court as the *only* federal court to police such awards. *See BMW,* 517 U.S. at 586.

The fact that *consumers* ultimately – and inevitably – pay punitive damages awards through higher premiums makes the prevalence of such awards in the insurance industry worthy of special attention by this Court. Indeed, this Court has recognized that "[d]rastic changes in the legal rules governing . . . insurance funds" can have a highly deleterious effect

on insurers and, ultimately, the insureds. Accordingly, "rules that apply to [insurance] funds should not be applied retroactively unless the legislature has plainly commanded that result." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978). Retroactivity is especially pernicious in the area of punitive damages, where it is not just a matter of legislative intent and where this Court has struggled to impose constitutional limits on state courts run amok. That perniciousness is compounded where, as here, the state court has gone so far as to preclude an out-of-state insurance company from introducing evidence that it meets the new, retroactively narrowed rule by which exposure to liability can be avoided.

Given its manifest failure to follow *BMW* and *Philip Morris* – and given the larger implications of punitive damages abuse – certiorari is warranted. And, while the petitioner would obviously welcome a full hearing on the merits, Audubon believes that the more appropriate course would be for this Court to vacate the judgment summarily and remand the case with instructions to reconsider, in light of *BMW* and *Philip Morris*, Audubon's request that it be allowed to present evidence that it qualifies as an agent of the FAIR Plan.

II. WITH RESPECT TO COMPENSATORY DAMAGES, THE NEW MEXICO SUPREME COURT'S RULING ALSO VIOLATES STANDARDS OF DUE PROCESS.

As embodied in the Fourteenth Amendment, due process requires a State to provide a person with notice and an opportunity to be heard before the State may deprive him of his property. Indeed, as this Court recently reaffirmed:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"

Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Baldwin v. Hale*, 68 U.S. 223, 1 Wall. 223, 233 (1864)) (other citations omitted). Within these broad principles, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). As the Court has explained, the specific dictates of due process generally requires consideration of several factors, including "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335.

In keeping with this flexible approach, this Court has stopped short of giving defendants the same level of due process protections in the context of compensatory damages that it has mandated in the context of punitive damages. *See, e.g., BMW,* 517 U.S. at 575, n.22 (distinguishing between civil cases in general and civil penalties). This approach inevitably carries with it the potential for some confusion – and the need for clarification – as to the requirements of due process in lawsuits for compensatory damages.

In its second question presented, this petition furnishes a vehicle for providing clarification in a discrete but important set of circumstances. Audubon does not seek a unitary approach that would abolish potentially important due process distinctions between punitive damages and compensatory damages. The private interest that will be affected in the former case may very well weigh more heavily than in the latter. Thus, with respect to compensatory damages, Audubon does not contend that due process was violated simply because the state supreme court retroactively changed the standard by which its immunity as an agent would be judged. Audubon's contention is far more modest. Once the new standard was retroactively imposed, Audubon was entitled to present evidence showing that it meets that new standard. "The *right to present evidence* is, of course, *essential* to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) (emphasis added).

The right to present evidence is typically made available before appeals are taken; however, the route taken by the case at bar – the interlocutory appeal of a motion to dismiss – precluded the development of a full record when the case was originally in the trial court. These are not circumstances unique to this case. For example, in both the federal and state systems, interlocutory appeals are available when a motion to dismiss based on immunity has been denied. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (holding that denial of sovereign immunity is immediately appealable under the collateral order doctrine); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (holding that denial of qualified immunity is immediately appealable under the collateral order doctrine). Other interlocutory appeals may be available as well. *See, e.g.,* 28 U.S.C. § 1292(a) (providing for interlocutory appeal from grant or denial of preliminary injunction); 28 U.S.C. § 1292(b) (allowing possibility of appeal when there is "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation").

Whether taken pursuant to these federal procedures or their state law counterparts, interlocutory appeals may require the appellate tribunal to announce a new rule of law – or to clarify an existing rule – in a way that implicates factual issues for which a full record has not been developed. In such a

case, rather than making a final factual ruling based on the limited evidence before it, the appellate tribunal should remand the case for further proceedings consistent with the newly-announced rule and allow the parties to present the evidence that the new ruling now makes relevant. Fundamental fairness requires such an approach, and Audubon seeks certiorari in order to ask the Court so to rule.

Guidance from this Court on the requirements of due process under these circumstances would benefit appellate tribunals nationwide, as well as the parties who litigate before them. By denying Audubon's request for the right to present evidence, the state supreme court "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10. Certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted and the judgment of the New Mexico Supreme Court should be summarily vacated. The case should be remanded to the New Mexico Supreme Court with instructions for reconsideration in light of the decisions in *BMW* and *Philip Morris*.

In the alternative, the petition for writ of certiorari should be granted and, following a hearing on the merits, the judgment of the New Mexico Supreme Court should be vacated and the case remanded with

instructions that Audubon be allowed to defend against both compensatory and punitive damages by presenting evidence at trial that it is an agent of the FAIR Plan and, thus, immune from suit under state law.

Respectfully submitted,

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Audubon Indemnity Insurance Group's Petition for a Writ of Certiorari in the Supreme Court of the United States

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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Opinion Number:

Filing Date: June 15, 2007

NO. 29,624

CORA MAES,

Plaintiff-Petitioner,

v.

AUDUBON INDEMNITY INSURANCE GROUP,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Sam B. Sanchez, District Judge

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OPINION

SERNA, Justice.

Cora Maes ("Maes") sued her property insurer, Audubon Indemnity Insurance Group ("Audubon"), after it originally denied her insurance claim for destroyed property. Audubon asserted immunity from suit on the basis that Maes obtained her insurance with Audubon through the New Mexico Fair Access to Insurance Requirements Plan Act ("FAIR Plan Act" or "the Act"), NMSA 1978, §§ 59A-29-1 to -9 (1985, as amended through 1999), which provides statutory immunity from suit for certain parties with respect to certain actions taken pursuant to the FAIR Plan Act. Section 59A-29-7 (or "immunity provision"). We issued a writ of certiorari to the Court of Appeals to review its opinion, which held that Audubon was statutorily immune from suit. *Maes v. Audubon Indem. Ins. Group,* 2006-NMCA-021, 139 N.M. 39, 127 P.3d 1126. For the reasons discussed below, we hold that the FAIR Plan Act's immunity provision does not apply to Audubon; and, therefore, Audubon is not immune from Maes's suit. Accordingly, we

reverse the Court of Appeals and remand to the district court.

I. BACKGROUND

A. Statewide Plans to Assure Fair Access to Insurance Requirements

The Legislature passed the New Mexico FAIR Plan Act in 1985 under the framework of the federal Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), *see* 12 U.S.C. §§ 1749bbb to 1749bbb-21 (1970) (repealed 1985-1996), which Congress promulgated following inner city rioting in the late 1960s. 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 4:6 (3d ed.2005). The UPPRA provided for federal reinsurance against riot and civil unrest losses to insurance companies. 12 U.S.C. § 1749bbb to § 1749bbb-21; *see* Russ & Segalla, *supra,* § 4:6. To be eligible for such reinsurance, the UPPRA required insurers to cooperate with their state insurance authorities to establish fair access to insurance requirements ("FAIR") plans "designed to make essential property insurance more readily available." 12 U.S.C. § 1749bbb-3(a) to (b). FAIR plans are intended to create a means for high-risk property owners to obtain essential property insurance coverage, where they would not otherwise be able to do so on the normal insurance market because their risks would be unprofitable for insurance companies to assume on a voluntary basis. *See* Russ & Segalla, *supra,* §§ 1:27; 4:6.

B. The New Mexico FAIR Plan Act

The New Mexico FAIR Plan Act authorizes all insurers licensed to write essential property insurance in New Mexico to establish and maintain a FAIR plan to provide essential property insurance to responsible and qualified applicants unable to obtain insurance on the open market. Section 59A-29-2; NMPIP Bylaws, introduction, at 1, http://www.nmprc.state.nm.us/insurance/pdf/nmfairplanbylaws.pdf [hereinafter NMPIP Bylaws]. The Act further authorizes insurers to form the non-profit underwriting association known as the New Mexico Property Insurance Program ("NMPIP"). *Id.* In order to transact property insurance business in New Mexico, all insurers licensed to write essential property insurance in the state are required to become and remain members of the FAIR Plan and the NMPIP and to subscribe to the NMPIP Articles of Association. Section 59A-29-3.

The NMPIP is not itself an insurance company. NMPIP Bylaws, introduction, at 1. However, the Act authorizes the NMPIP, "on behalf of its members[,] to cause to be issued property insurance policies." Section 59A-29-4. The program operates as follows. Applicants or their representatives or insurance agents apply directly to the NMPIP for coverage. NMPIP Bylaws, introduction, at 1. If the NMPIP decides the property is eligible for insurance, it forwards the application to a "Servicing Insurer." *Id.* § IV.1, at 3. Audubon is a Servicing Insurer for the NMPIP, which means that it has contracted with the

NMPIP "to issue and service policies on risks referred to it by the [NMPIP]." *Id.* § III.8, at 2. The Servicing Insurer then issues and delivers the actual policy directly to the applicant and services the policy, remitting the premium to the NMPIP. *Id.* § V.1, at 3. The NMPIP is authorized to provide reimbursement for all of the Servicing Insurer's costs and expenses. NMPIP Bylaws, § XII.6, at 8.

The FAIR Plan Act also provides a remedy for aggrieved insureds. They may appeal the actions and decisions of the FAIR Plan administrators, the NMPIP, or any insurer as a result of its participation in the FAIR Plan and the NMPIP to the New Mexico Superintendent of Insurance. Section 59A-29-6(A). Thereafter, all final orders and decisions of the Superintendent of Insurance are subject to review in district court. Section 59A-29-6(B).

Finally, the Act provides immunity to certain parties for certain actions taken with respect to the FAIR Plan:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

Section 59A-29-7.

The NMPIP reinsures all insurance policies issued by the Servicing Insurer pursuant to the FAIR Plan. Section 59A-29-4 (authorizing the NMPIP "to reinsure in whole or in part any such policies and to cede any such reinsurance"); NMPIP Bylaws, § VI.1, at 4. Reinsurance refers to:

> the ceding by one insurance company to another of all or a portion of its risks for a stipulated portion of the premium. In a true reinsurance transaction, the liability of the reinsurer is solely to the reinsured, which retains all contact with the original insured, and handles all matters prior to and subsequent to loss.

14 Eric Mills Holmes & L. Anthony Sutin, Holmes' *Appleman on Insurance,* § 102.1 (2d Ed.2000) (quoted authority omitted). We adopted an almost identical definition of reinsurance in 1973. *Sierra Life Ins. Co. v. First Nat'l Life Ins. Co.,* 85 N.M. 409, 412, 512 P.2d 1245, 1248 (N.M.1973) (quoting similar section from an earlier edition of *Appleman Insurance Law and Practice*). Reinsurance essentially "operates to shift part of the risk of loss under an insurance policy from the original insurer to the reinsurer, with the original insurer remaining in privity with the insured." Holmes & Sutin, *supra,* § 102.1 (internal quotation marks omitted). Indeed, one of the fundamental principles of reinsurance is that "the reinsurer ordinarily has no liability to the policyholder of the ceding insurer." *Id.* § 106.7. Our reinsurance statute reflects this principle: "No person shall have any rights

against the reinsurer which are not expressly stated in the reinsurance contract or in a written agreement between such person and the reinsurer." NMSA 1978, § 59A-7-11(G) (1993).

II. FACTUAL AND PROCEDURAL HISTORY

Maes's Arroyo Seco property was completely destroyed by fire on May 2, 2000. The property was insured by Audubon through the New Mexico FAIR Plan, under a policy effective March 20, 2000 to March 20, 2001. Maes filed a claim under her policy on May 3, 2000. Audubon denied liability for the loss on August 3, 2000. Maes then appealed to the New Mexico Superintendent of Insurance pursuant to the mechanism provided for in the New Mexico FAIR Plan Act. Section 59A-29-6(A). On October 19, 2001, the Superintendent of Insurance ruled in favor of Maes, finding that she was entitled to recover under her Audubon policy for the fire damage to her property. Audubon appealed the decision in district court, pursuant to the FAIR Plan Act, and the district court affirmed the Superintendent's decision on February 13, 2003. On March 6, 2003, Audubon paid Maes the policy limits of $150,000 for her loss.

Thereafter, in an initial Complaint on September 17, 2003, and a Second Amended Complaint on February 5, 2004, Maes sued Audubon in district court for (i) pre- and post-judgment interest on the $150,000 judgment; (ii) breach of the implied covenant of good faith and fair dealing; and (iii) bad faith

insurance practices. On June 14, 2004, Audubon moved to dismiss Maes's claims on the ground that Audubon had statutory immunity from suit because it issued the policy as Servicing Insurer of the NMPIP. *See* § 59A-29-7. The district court denied the Motion to Dismiss on October 1, 2004.

Audubon appealed to the Court of Appeals, which, in a split decision, reversed the district court, concluding that Audubon was statutorily immune from suit. *Maes,* 2006-NMCA-021, ¶¶ 1, 7. The Court of Appeals declared the immunity provision "clear and unambiguous" and held that Audubon is an agent of the NMPIP because of its status as the NMPIP's Servicing Insurer and is thus immune from suit. *See Maes,* 2006-NMCA-021, ¶¶ 11, 16. Audubon urges the same reading on appeal. Maes, however, contends that Audubon's action in insuring her property was not taken as an agent of the NMPIP and that such an interpretation would produce results wholly incongruous to the legislative purpose of the FAIR Plan Act.

III. SECTION 59A-29-7 DOES NOT APPLY TO AUDUBON

A. Standard of Review and Rules of Statutory Construction

In this case, we must decide whether the immunity provision of the New Mexico FAIR Plan Act,

Section 59A-29-7, shields Audubon, in its role as the Servicing Insurer of the NMPIP, from Maes's suit.[1] Statutory interpretation is an issue of law, which we review de novo. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (N.M.1995). Our primary purpose in interpreting a statute is "to ascertain and give effect to legislative intent." *Kahrs v. Sanchez,* 1998-NMCA-037, ¶ 11, 125 N.M. 1, 956 P.2d 132. In so doing, "we are mindful that statutes are to be interpreted in order to facilitate their operation and the achievement of their goals." *Lopez v. Employment Sec. Div.,* 111 N.M. 104, 105, 802 P.2d 9, 11 (1990). In ascertaining legislative intent, we examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish. *See Hovet v. Allstate Ins. Co.,* 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69; *N.M. State Bd. of Educ. v. Bd. of Educ.,* 95 N.M. 588, 591, 624 P.2d 530, 533 (1981). We give effect to the legislative intent "by adopting a construction which will not render the statute's application absurd or unreasonable and will not lead to injustice or contradiction." *N.M. State Bd. of Educ.,* 95 N.M. at 591, 624 P.2d at 533.

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[1] We agree with the Court of Appeals that Audubon is not immune from Maes's suit as a result of its status as a Member Insurer of the NMPIP, *Maes,* 2006-NMCA-021, ¶ 10, and thus only analyze Audubon's status as a Servicing Insurer of the NMPIP.

B. Section 59A-29-7 Does Not Apply to Audubon as a Servicing Insurer of the NMPIP

Our resolution of this issue of first impression hinges on one two-prong question. First, we must determine whether Section 59A-29-7 applies to Audubon. In making that determination, we must also decide whether Audubon's actions were the types of actions, which the Legislature contemplated should be immune from suit. As we analyze the issue, the first and second prongs are related. For the following reasons, we hold that Section 59A-29-7 does not apply to Audubon.

In determining whether the immunity provision of the New Mexico FAIR Plan Act applies to Audubon, we commence with an examination of the plain language of the statute. *See State v. Cleve,* 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. The Act provides in pertinent part:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

Section 59A-29-7. The immunity provision does not specifically name Servicing Insurers, which indicates a legislative intent that Servicing Insurers were to be treated distinctly from Member Insurers. Our

interpretation of the immunity provision is supported by the NMPIP Articles of Association, as Judge Robinson ably pointed out in his dissent below. *Maes,* 2006-NMCA-021, ¶¶ 33-38 (Robinson, J., dissenting). As he explained:

> The NMPIP [Articles of Association Article VIII][2] provide indemnification to member insurers only as to their status as a member, or by reason of the insurer having personal representatives or employees serving on the governing committee, other committee or subcommittee, or officer or employee of the NMPIP.
>
> Even the indemnification for officers and employees of the NMPIP is limited to actions taken in connection with the administration, management, conduct, or affairs of the Program or the Committee. Nowhere in the Articles or Bylaws is there a provision to provide indemnification to the member insurers for actions taken in their capacity as servicing [insurer]s. That failure to provide indemnification is consistent with the notion that the Program is not liable for the servicing [insurer]'s liability arising from the contracts it enters into with its insureds.

Id. ¶¶ 33-34 (Robinson, J., dissenting). In addition, the *indemnification* provision further supports a narrow reading of the *immunity* provision because

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[2] NMPIP Articles of Association, Article VIII, http://www.nmprc.state.nm.us/insurance/pdf/nmfairplanarticlesofassoc.pdf.

indemnification would be wholly unnecessary if all parties and all actions were immune from suit pursuant to Section 59A-29-7.

Therefore, where as here the Legislature has not specifically indicated an intent to immunize Servicing Insurers from suit, we will not presume one. We find unpersuasive the reasoning of the Court of Appeals that the immunity provision represents a legislative compromise wherein property owners who would otherwise be unable to obtain insurance are able to do so in exchange for being deprived of the right to sue their insurer for bad faith. *Id.* ¶ 22. The Legislature never indicated that, by virtue of obtaining insurance through the NMPIP, insureds would submit themselves to the unfettered whims of the Servicing Insurer. Adopting such a construction would render the FAIR Plan Act's application irrational by leading to the contradiction and injustice of holding some insurers to a good faith standard, while exempting others, merely because of the manner in which the insurance was obtained. Thus, with the legislative intent of the FAIR Plan Act as our polestar, we hold that Section 59A-29-7 does not apply to Audubon as a Servicing Insurer of the NMPIP. *See State v. Herrera,* 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974).

C. Audubon Is Not an Agent of the NMPIP

The immunity provision specifically immunizes "the association," i.e., the NMPIP, and "its agents." Section 59A-29-7. Having determined that Audubon

is not immune as a Servicing Insurer of the NMPIP, the sole issue before us is whether Audubon is an agent of the NMPIP. We are unable to determine, based on the plain language alone, whether Audubon is an agent of the NMPIP for purposes of the immunity provision. Therefore, we must construe Section 59A-29-7, in the context of its legislative purpose and history, to determine whether Audubon is an agent of the NMPIP and thus immune from suit on that basis. *See In re Extradition of Martinez,* 2001-NMSC-009, ¶ 14, 130 N.M. 144, 20 P.3d 126; *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers,* 1998-NMSC-020, ¶ 28, 125 N.M. 401, 411, 962 P.2d 1236, 1246 (citing *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 351-52, 871 P.2d 1352, 1357-58 (1994)).

The Court of Appeals held that Audubon, as the Servicing Insurer of the NMPIP, is an agent of the NMPIP and, on that basis, is entitled to statutory immunity pursuant to Section 59A-29-7. *Maes,* 2006-NMCA-021, ¶¶ 11, 13. We decline to so hold. The Court of Appeals based this determination on the definition of "agent" contained in UJI 13-401 NMRA:

> An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation. The agreement may be oral or written.

The Court of Appeals reasoned that because "Audubon has an agreement with the FAIR Plan to service

the policies underwritten by the Plan, and Audubon is paid a fee for doing so[,] . . . Audubon is an agent of the FAIR Plan because it both 'manages some affair' and 'does some service for' the Plan." *Maes,* 2006-NMCA-021, ¶ 11. Audubon urges us to adopt the agency analysis of the Court of Appeals and, on that basis, hold it immune from Maes's suit.

The parties agree on this definition of "agent," but we are not persuaded that it provides the full picture of the nature and formation of the agency relationship for all purposes. The common law emphasizes the fiduciary nature of the agency relationship, which does not arise until "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). While Audubon and the NMPIP agreed that Audubon, as the Servicing Insurer of the NMPIP, would issue policies to persons referred by the NMPIP, and in return the NMPIP would reinsure all such policies and provide reimbursement for Audubon's related costs and expenses, this agreement does not evince the control necessary to form or constitute an agency relationship.

Audubon attempts to demonstrate that the NMPIP has "ultimate control . . . over the decisions and actions of its Servicing Insurer" by focusing our attention on Sections VIII and IX of the NMPIP Bylaws. Section VIII grants the NMPIP control over

cancelling policies issued pursuant to the FAIR Plan Act. NMPIP Bylaws, § VIII, at 4-6. Section IX provides for an appeal by "[a]ny applicant for insurance and any person insured under the Plan or any affected Insurer [to] appeal to the Governing Committee within fifteen (15) days after any final ruling, action or decision of the Program." *Id.* § IX, at 6. Audubon would have us read this provision as demonstrating that

> any ruling, action or decision affecting a person 'insured under the Plan' is a ruling, action or decision of the Program. . . . [and as] further demonstrat[ing] that the ruling, action, or decision of the Program (in this case through its agent the Servicing Insurer), is subject to review by the Governing Committee of the NMPIP.

Audubon misconstrues the NMPIP Bylaws in urging us to find the requisite control. These provisions, taken together, do not demonstrate that "anything and everything done in relation to a policy of insurance issued under the FAIR Plan Act, is done by the NMPIP, or by the Servicing Insurer subject to the review and authority of NMPIP," as Audubon contends. The reasonable construction of these provisions, read in the context of the Bylaws as a whole, is that the NMPIP has control over certain aspects of the FAIR Plan insurance policies, e.g., whether property is eligible for insurance under the FAIR Plan, *id.* § IV.1, at 3, and whether to cancel a policy issued under the FAIR Plan, *id.* § VIII, at 4-6, and

that the NMPIP Governing Committee has authority over administration and budgeting of the FAIR Plan, *id.* § XII.6-7, at 8. The Bylaws also make specific provision for the types of relationships into which the NMPIP Governing Committee may enter:

> The Governing Committee shall be empowered to contract with Servicing Insurers and provide reimbursement for all costs and expenses incurred by such Servicing Insurers; to appoint or otherwise contract for the services of a manager, employees or independent contractors which are reasonably necessary to carry on the business of the Program and Plan.

Id. § XII.6, at 8. However, the reasonable reading of these provisions, and the reading which we adopt, is that the requisite control does not exist nor does any textual basis from which we can imply a principal-agent relationship between the NMPIP and Audubon.

We find guidance in the analogous reasoning applied to cases construing the immunity available under the Tort Claims Act. In one such case, our Court of Appeals determined that a community mental health facility was not an agent of the state for purposes of the Tort Claims Act and thus was not immune from suit. *Armijo v. Dept. of Health and Env't,* 108 N.M. 616, 775 P.2d 1333 (Ct.App.1989). The Court of Appeals came to this conclusion despite an extensive state regulatory scheme to which Border Area, the mental health facility, was subject, including "safety, building standards, client eligibility, and

extensive requirements of case documentation." *Id.* at 618, 775 P.2d at 1335. However, "[t]he actual clinical decisions about which plaintiff complain[ed], as well as who w[ould] make those decisions, were reserved by [sic] Border Area." *Id.* The Court of Appeals found it "clear that [the Health and Environment Department] did not regulate what [wa]s alleged to have caused plaintiff's injuries" because, among other reasons, "the type of regulation at issue in this case d[id] not give the state the right to control the *details* of the work of Border Area." *Id.* (emphasis added). In reaching this conclusion, the Court of Appeals found persuasive *United States v. Orleans,* 425 U.S. 807 (1976), in which the United States Supreme Court "distinguished actions taken to insure [sic] compliance with the voluminous regulations from the actual supervision of the day-to-day affairs of the [community action] program, and held that the program was not an agency of the United States" for purposes of the Federal Tort Claims Act. *Armijo,* 108 N.M. at 620, 775 P.2d at 1337.

Indeed, we similarly held in *Cole v. City of Las Cruces* that notwithstanding the agreement between the City of Las Cruces and the Rio Grande Natural Gas Association which provided that "the City shall have the right to supervise, direct and control the employees of the Association" and that "the City was 'to solely operate and maintain the Association's system,'" the Association was not an agent or instrumentality of the City for purposes of the Tort Claims

Act and thus was not immune from suit. 99 N.M. 302, 305, 657 P.2d 629, 632 (1983).

The NMPIP indeed regulates Audubon, as its Servicing Insurer, much like the Department of Health and Environment regulated Border Area and the City of Las Cruces regulated the Rio Grande Natural Gas Association. Notwithstanding this regulation, we hold that the NMPIP does not have the requisite control over Audubon needed to establish a principal-agent relationship, just as Border Area was not an agent of the Department of Health and Environment, and the Rio Grande Natural Gas Association was not an agent of the City of Las Cruces. The decisions of which Maes complains, i.e., whether or not to pay her claim, were reserved to Audubon, not to the NMPIP, in the same way as the decisions at issue in *Armijo* and *Cole* were reserved to Border Area and the Rio Grande Natural Gas Association, respectively.

Any other interpretation under the facts of this case would strain the reasonable bounds of the definition of the agency relationship. Audubon, as an insurer writing essential property insurance in the State of New Mexico, is required by law to be a member of the New Mexico FAIR Plan and the NMPIP and is so. *See* § 59A-29-3. However, if we adopt the agency analysis of the Court of Appeals and that urged by Audubon, we overlook the more critical relationship between NMPIP and Audubon, which represents the paradigmatic reinsurance relationship. The Court of Appeals may have been led to its

conclusion by its misconstrual of the reinsurance relationship, which it characterized as follows: "[O]nce claims have been approved, the money paid to insureds comes from the Plan itself. Thus, the Plan completely 'reinsures' all policies issued by the servicing insurer, and the servicing insurer acts in an essentially administrative capacity, bearing no actual risk." *Maes,* 2006-NMCA-021, ¶ 4.

While the NMPIP reinsures Audubon, the original or ceding insurer, Audubon remains in privity with Maes, the insured. *See* Holmes & Sutin, *supra,* §§ 102.1, 106.7. Therefore, the fact that the NMPIP reinsures Audubon provides "no direct benefit to the insured," i.e., Maes. *See id.* § 102.1 (quoting *Epland v. Meade Ins. Agency Assoc.,* 564 N.W.2d 203, 205 n. 1 (Minn.1997)). As the reinsurer, the NMPIP protects Audubon, the reinsured, from the risks it undertakes with respect to insuring Maes, but Maes, the original insured, has no interest in the reinsurance relationship between the NMPIP and Audubon. *See id.*

Therefore, the reinsurer, the NMPIP, has a relationship only with Audubon, not with Maes. Maes's relationship with Audubon is not affected by the NMPIP's reinsurance relationship with Audubon, which further reinforces our conclusion that Audubon is not an agent of the NMPIP, and the FAIR Plan Act's immunity provision does not apply to Audubon as such. In the same way that privity does not run between the reinsurer and the insured, likewise no principal-agent relationship exists between the

reinsurer and the original insurer. As one commentator explains:

> It has been urged . . . that an agency relationship exists between the insurer and its reinsurer, with the reinsurer being the principal directly responsible for the acts or omissions of the insolvent insurer. . . . However, since the right of a principal to control the behavior of an agent is an essential element of an agency relationship, courts are unwilling to bind a reinsurer for the acts of the reinsured company unless it is clear from the reinsurance agreement that the reinsurer has control over the relationship that the original insurer has with its policyholders.

Holmes & Sutin, *supra,* § 106.7; *accord* § 59A-7-11(G). No such control exists here. Therefore, Audubon, the original insurer, is not the agent of the NMPIP, the reinsurer, for the purposes of negotiating and settling claims. *Cf.* Holmes & Sutin, *supra,* § 106.7 (noting that "[e]ven when a reinsurer has become actively involved in settlement negotiations between reinsured insurer and its policyholders, courts have refused to find liability under an agency or joint enterprise theory"). The fiduciary relationship runs between Maes and Audubon, as her direct insurer, and that relationship does not change, as amicus New Mexico Property and Casualty Insurance Guaranty Association contends, merely because the policy was issued under the auspices of the FAIR Plan.

IV. CONCLUSION

Based on the foregoing analysis, we hold that the FAIR Plan Act's immunity provision, Section 59A-29-7, does not apply to Audubon as a Servicing Insurer of the NMPIP. We further hold that Audubon, as a Servicing Insurer of the NMPIP, is not an agent of the NMPIP and, accordingly, is not immune from Maes's suit on that basis. Having held that the FAIR Plan Act's immunity provision does not apply to Audubon as Servicing Insurer nor as an agent of the NMPIP, we do not separately address whether Audubon's actions were "in the performance of . . . powers and duties under the FAIR Plan Act." *See* § 59A-29-7. Accordingly, we reverse the Court of Appeals and remand to the district court.

IT IS SO ORDERED.

/s/ Patricio M. Serna
PATRICIO M. SERNA, Justice

WE CONCUR:

/s/ Edward L. Chavez
EDWARD L. CHAVEZ, Chief Justice

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

/s/ Petra J. Maes
PETRA JIMENEZ MAES, Justice

/s/ Richard C. Bosson
RICHARD C. BOSSON, Justice

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: December 21, 2005

NO. 25,298

CORA MAES,

Plaintiff-Appellee,

v.

AUDUBON INDEMNITY INSURANCE GROUP,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Sam B. Sanchez, District Judge

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OPINION

PICKARD, Judge.

{1} In this case, we decide whether the FAIR Plan Act, codified at NMSA 1978, §§ 59A-29-1 to -9 (1985, as amended through 1999), provides immunity from a suit for bad faith insurance practices and pre- and post-judgment interest brought by an insured against the servicing insurer of the New Mexico FAIR Plan. We decide that the Act does provide immunity, and we reverse the district court's denial of the insurance company's motion to dismiss.

BACKGROUND

1. The FAIR Plan

{2} Since the 1960s, many states have established FAIR ("fair access to insurance requirements") plans, which are "residual market" property insurance plans. 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 1:27 (1997) (internal quotation marks omitted). They are designed to provide insurance to property owners who are not able to obtain coverage in the normal market because their risks would be unprofitable for an insurance company to voluntarily assume. *Id.*

{3} The New Mexico FAIR Plan was created by the Legislature in 1985, and its purpose is to provide essential property insurance to this category of property owners. The FAIR Plan Act and the Plan's bylaws establish the following facts about the Plan's

operations. Section 59A-29-2 authorizes all insurers who write essential property insurance in New Mexico to come together to form a FAIR Plan and to establish a not-for-profit underwriting association, which is known as the New Mexico Property Insurance Program ("NMPIP" or "the Plan"). All insurers who write essential property insurance in the state are required to be members of the Plan. Section 59A-29-3. Each member insurer shares in the Plan's losses and expenditures in an amount proportionate to that member's share of all essential property insurance policies written in the state.

{4} The Plan has a contract with Audubon Indemnity Insurance Group (Audubon), the defendant in this case, under which Audubon acts as the Plan's "servicing insurer." Under the Plan's bylaws, this means that Audubon services all FAIR Plan policies by issuing policies to approved applicants and adjusting claims. However, the bylaws also indicate that the Plan itself reviews all applications and decides whether a policy should be issued and that all premiums are remitted directly to the Plan. Moreover, once claims have been approved, the money paid to insureds comes from the Plan itself. Thus, the Plan completely "reinsures" all policies issued by the servicing insurer, and the servicing insurer acts in an essentially administrative capacity, bearing no actual risk.

{5} The FAIR Plan Act also provides a specific remedy for insureds. Any person "aggrieved by an action or decision of the administrators of the FAIR plan or the underwriting association or of any insurer

as a result of its participation" has the right to appeal the action or decision to the Superintendent of Insurance. Section 59A-29-6. The Superintendent must hold a hearing and issue an order approving or disapproving the action or decision. *Id.* The Superintendent's decision may then be reviewed in district court by way of administrative appeal. *Id.*

{6} Finally, the Act provides for immunity under certain circumstances. Section 59A-29-7 states in relevant part:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

The dispute in the present case centers around the proper interpretation of this statute.

2. Facts

{7} Audubon is the servicing insurer for the FAIR Plan. Audubon issued a FAIR Plan property insurance policy to Plaintiff-Appellee (Maes) in March 2000. After a fire on her property, Maes made a claim with Audubon, which Audubon denied. In accordance with the scheme set forth in Section 59A-29-6, Maes then appealed the denial of coverage to the Superintendent of Insurance. The Superintendent held a

hearing and decided that Audubon was required to pay the claim. After Audubon appealed to the district court, which upheld the Superintendent's order, Audubon paid the claim. Then, Maes filed a separate action against Audubon in district court, seeking pre- and post-judgment interest. She also sought compensatory and punitive damages for Audubon's alleged bad faith insurance practices and breach of the covenant of good faith and fair dealing. Audubon moved to dismiss the complaint, arguing that it was immune from suit under Section 59A-29-7. After the district court denied Audubon's motion, Audubon filed a petition for a writ of error with this Court. Audubon argued that this was an appropriate case in which to invoke the "collateral order" doctrine, which allows for appeal of non-final orders when, inter alia, the complaining party claims a right that will be effectively lost if the case is permitted to proceed. *See Carrillo v. Rostro*, 114 N.M. 607, 613-14, 845 P.2d 130, 136-37 (1992). Because immunity from suit is such a right, *see Campos de Suenos, Ltd. v. County of Bernalillo*, 2001-NMCA-043, ¶ 15, 130 N.M. 563, 28 P.3d 1104, we granted Audubon's petition. We now reverse.

STANDARD OF REVIEW

{8} The parties dispute whether the district court's order should be treated as ruling on a Rule 1-012(B)(6) NMRA motion or a ruling on motion for summary judgment. Because materials outside the pleadings, such as the bylaws of the Plan and

documents from the proceeding before the Superintendent and the earlier district court appeal, were considered by the district court, we treat it as a motion for summary judgment. *See* Rule 1-012(B). When the facts are undisputed, we review rulings on summary judgment de novo. *State Farm Mut. Auto. Ins. Co. v. Barker,* 2004-NMCA-105, ¶ 4, 136 N.M. 211, 96 P.3d 336. With the exception of one assertion contained in an affidavit that was before the district court, the material facts of the case are undisputed. Because we do not consider the affidavit, the only question that we must decide is whether Section 59A-29-7 provides the FAIR Plan's servicing insurer with immunity from suit. That is a purely legal question of statutory construction, which we review de novo. *See State v. McClendon,* 2001-NMSC-023, ¶ 2, 130 N.M. 551, 28 P.3d 1092.

DISCUSSION

{9} For convenience, we begin by reiterating the language of Section 59A-29-7:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

The statute presents us with two questions: (1) whether Audubon is an entity to which the statute

applies and (2) whether Audubon's actions in this case were conducted as part of its "powers and duties" under the FAIR Plan Act.

{10} As to the first question, Audubon advances two theories. First, Audubon argues that the statute applies to it because of its status as a member insurer. We do not agree. As Maes points out, the FAIR Plan Act gives member insurers only two "duties": (1) to "become and remain a member of the FAIR plan and the underwriting association and comply with the requirements thereof," and (2) to "subscribe to the articles of agreement on file in the superintendent's office." Section 59A-29-3. While Audubon is a member insurer (as all insurers must be in order to maintain licensure to sell essential property insurance in New Mexico), all of its actions that are relevant to this case were undertaken in its capacity as the Plan's servicing insurer, not in its capacity as a member insurer. Thus, we agree with Maes that Audubon is not immune from suit in this case as a result of its being a member insurer.

{11} Second, Audubon argues that it is entitled to the statutory immunity because, as the servicing insurer, it is an agent of the FAIR Plan. New Mexico law defines an agent as "a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation." UJI 13-401 NMRA. We agree that Audubon is the Plan's agent. Audubon has an agreement

with the FAIR Plan to service the policies underwritten by the Plan, and Audubon is paid a fee for doing so. Thus, Audubon is an agent of the FAIR Plan because it both "manages some affair" and "does some service for" the Plan. *See* UJI 13-401.

{12} Maes argues that Audubon is collaterally estopped from asserting the agency relationship because, Maes alleges, the Superintendent in the initial administrative proceeding found that Audubon was not an agent of the Plan. In support of this argument, Maes cites to the Superintendent's finding number 9 which provides that, "[n]either the [NMPIP] nor the [FAIR] Plan are authorized to appoint 'agents' to market insurance under the [FAIR] Plan." We take this statement to indicate only that the FAIR Plan does not appoint insurance agents who sell policies to consumers. We are supported in this reading by the next two findings in the Superintendent's order. In findings 10 and 11, the Superintendent stated that "[l]icensed insurance agents are acting as agents of and on behalf of an applicant when they submit applications to the [FAIR] Plan," and that "[t]he [FAIR] Plan does not have contracts with independent insurance agents or brokers." Thus, when reading finding 9, relied on by Maes, in the context in which it was written, we do not agree that the findings speak to the presence or absence of an agency relationship between the FAIR Plan and Audubon. Instead, we think these findings speak to the relationship between insureds and their agents on the one hand and the FAIR Plan on the other.

{13} We also note that for a party to be collaterally estopped from litigating a fact, that fact must have been actually litigated and necessarily determined in a prior proceeding. *Rex, Inc. v. Manufactured Hous. Comm.*, 2003-NMCA-134, ¶ 5, 134 N.M. 533, 80 P.3d 470. Because the only purpose of the proceeding before the Superintendent was to review Audubon's coverage decision, it would have been unnecessary to determine the legal relationship between Audubon and the FAIR Plan. Thus, even if the Superintendent had made a finding regarding the relationship, collateral estoppel would be inapposite. Because Audubon is under a contractual obligation to provide a service to the FAIR Plan, we hold that it is an agent of the Plan. As such, it is an entity to whom the statutory immunity applies.

{14} The second question presented in this appeal is whether Audubon's actions were "taken by [it] in the performance of [its] powers and duties under the FAIR Plan Act." *See* § 59A-29-7. Maes argues that the term "powers and duties" refers only to establishing and administering the FAIR Plan, and not to the actual issuance or servicing of insurance policies. Audubon argues that issuing and servicing policies are the servicing insurer's primary "duties" under the FAIR Plan Act. We agree with Audubon. Section 59A-29-4, which describes the authority of the Plan, states that the NMPIP has "authority on behalf of its members to cause to be issued property insurance policies." But because, under the Plan's bylaws, the Plan itself does not issue insurance policies, the Act

necessarily contemplates that the Plan will contract with a servicing insurer who will issue and service policies. Thus, because Audubon plays a necessary role as the Plan's agent that helps to carry out the Plan's powers and duties, the issuance and servicing of policies are actions "taken by [Audubon] in the performance of [its] powers and duties under the FAIR Plan Act." *See* § 59A-29-7.

{15} Maes further asserts that the Plan's bylaws support a limited interpretation of the immunity statute because they do not provide for indemnification for actions taken by the servicing carrier. Maes seems to be arguing that (1) the statute clearly provides immunity for the Plan itself, (2) if the Plan indemnified the servicing carrier, that would indicate that the servicing carrier was simply acting as an instrumentality of the Plan and should thus get the benefit of the immunity statute, and (3) the fact that the Plan's articles and bylaws do not provide for such indemnity means that the servicing carrier is distinguishable from the Plan such that we should hold the immunity statute inapplicable to it. We reject this argument. First, we note that because all claims are ultimately paid by the Plan itself, there would be no logical reason for the Plan it indemnify the servicing carrier. Second, even if the Plan's articles or bylaws did provide indemnification for the servicing carrier, that would not change the effect of the immunity statute, which we have held applicable to the servicing carrier because it is the Plan's agent that helps to carry out the Plan's powers and duties under the Act.

{16} Maes also seems to argue that we should hold the immunity provision not applicable to Audubon because, even though the Plan ultimately pays any claims that are approved, it would not be liable for damages awarded as a result of the servicing carrier's breach of contractual obligations. We recognize that reinsurers like the Plan are generally liable only for claims paid out by the reinsured, and not for other types of damages. *See* 14 Eric M. Holmes & L. Anthony Sutin, *Holmes' Appleman on Insurance 2d* § 102.5(F), at 50-51 (2000) ("In the absence of a provision in the reinsurance contract providing coverage for 'bad faith' damages paid by the ceding insurer, . . . the reinsurer is not obligated to reimburse them."). However, we do not see the relevance of determining who would ultimately pay if Maes were allowed to proceed with her bad faith claims. The answer to that question would not alter our reading of the immunity statute, which states that "no cause of action of any nature shall arise" against the FAIR Plan or its agents. *See* § 59A-29-7. Because the language of the Act is "clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation." *State v. Vaughn*, 2005-NMCA-076, ¶ 33, 137 N.M. 674, 114 P.3d 354 (internal quotation marks and citation omitted). Thus, we agree with Audubon that all of Maes's claims are barred by the immunity statute.

{17} Maes also asserts that even if Audubon is protected by the immunity statute under certain circumstances, it is not protected from suits based on

contract claims. In support of this argument, Maes cites *Moriarty Municipal Schools v. New Mexico Public Schools Insurance Authority*, 2001-NMCA-096, 131 N.M. 180, 34 P.3d 124. *Moriarty* involved a statutorily created entity, the Public Schools Insurance Authority, which provided insurance to public schools. *See id.* ¶¶ 2, 6. After a denial of coverage, Moriarty sued the Authority for breaches of contract, fiduciary duty, and the implied covenant of good faith and fair dealing. *Id.* ¶ 4. The Authority moved to dismiss the claims on the basis of sovereign immunity. *Id.* ¶ 9. This Court ruled that sovereign immunity was not applicable. *Id.* ¶ 26. Maes relies on the following language from *Moriarty*: "The Authority cannot escape the realm of contract. Receiving a premium, providing insurance coverage, and denying benefits indicate the existence of a valid, written, enforceable insurance contract . . . between the Authority and Moriarty. . . . Moriarty therefore states a claim . . . for breach of contract which is not barred by sovereign immunity." *Id.*

{18} We find *Moriarty* to be distinguishable from the present case in two ways. First, in *Moriarty*, the defendant relied on sovereign immunity, rather than a specific grant of statutory immunity as is present in this case. To overcome the sovereign immunity defense, the *Moriarty* plaintiff was only required to allege the existence of a valid written contract. *Id.* ¶ 18 ("Because the Authority is a state governmental entity, Section 37-1-23 [the statute codifying sovereign immunity for contract claims] requires

Moriarty to prove the existence of a valid written contract and permits a Rule 1-012(B)(6) dismissal if Moriarty cannot allege such a contract in its complaint against the Authority."). Here, there is no dispute that a valid insurance contract existed between Maes and Audubon. But because the issue here is statutory immunity and not sovereign immunity, that fact does not help Maes.

{19} *Moriarty* is also distinguishable because the Court's primary concern in that case seems to have been that if Moriarty was barred by sovereign immunity from bringing its claims, it would have no avenue for relief whatsoever. *Id.* ¶ 20 ("The Authority made a unilateral determination of the extent of its ... obligation, placing Moriarty at risk of inadequate recovery, with no adjudicatory process through which Moriarty could make a record supporting its position on the extent of the Authority's obligation."). Here, the FAIR Plan Act does provide a remedy – aggrieved individuals may appeal coverage decisions to the Superintendent, and they may then have the Superintendent's decision reviewed in the district court. Section 59A-29-6. Thus, *Moriarty* is not controlling. Because FAIR Plan insureds do have a remedy, we see no reason to disregard the explicit language of the immunity statute.

{20} The other case Maes relies on is similarly inapposite. In *Louie v. State,* 586 P.2d 364 (Ore. Ct. App. 1978), a FAIR Plan insured sued the Plan itself for denying coverage. An immunity statute was held not to bar the suit, which was considered a breach of

contract action. *Id.* at 365-66. The *Louie* court relied on specific legislative history indicating that the immunity provision was intended to apply to tort actions and not to the type of claim at issue in that case. *Louie,* 586 P.2d at 366. Moreover, we note that the Oregon FAIR Plan Act did not provide any remedy for coverage denials. Here, the FAIR Plan Act provided Maes with a remedy, which she exercised. *See* § 59A-29-6. Thus, *Louie* is distinguishable from the present case and, like *Moriarty*, provides us with no authority under which to depart from the clear language of our immunity statute.

{21} Finally, Maes urges us to hold the immunity statute inapplicable to Audubon on two public policy grounds. First, she argues that if Audubon is immune under these circumstances, then FAIR Plan insureds would be "at the utter mercy of the insurance companies" and would have "absolutely no recourse for bad faith conduct or breaches of contract, regardless of how egregious the conduct might be." Second, she argues that it would constitute discrimination between insureds in violation of the Insurance Code if FAIR Plan insureds are prohibited from suing their insurers for bad faith and interest while other insureds are permitted to do so. *See* NMSA 1978, § 59A-16-17(D) (1984) (prohibiting discrimination between similarly situated insureds as to terms and conditions of coverage).

{22} We decline to depart on policy grounds from the result dictated by the language of the immunity statute. In view of the statute's clear and broad

language, it seems reasonable to us to assume that the Legislature chose to set forth the following compromise: property owners may obtain insurance when they might not otherwise be able to, and in addition, they are given a speedy administrative remedy including the opportunity for judicial review; in exchange, they are deprived of the right they would ordinarily have to sue their insurers for bad faith. *Cf. Morales v. Reynolds,* 2004-NMCA-098, ¶ 6, 136 N.M. 280, 97 P.3d 612 ("The [Workers' Compensation] Act fulfills [its] purpose through a bargain in which an injured worker gives up his or her right to sue the employer for damages in return for an expedient settlement covering medical expenses and wage benefits, while the employer gives up its defenses in return for immunity from a tort claim."). While it could be said that FAIR Plan Act compromise constitutes "discrimination" between different types of insureds, we find it to be a legitimate policy judgment by the legislature that we decline to second-guess. *See Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 214, 922 P.2d 1205, 1210 (1996) ("[I]t is the particular domain of the legislature, as the voice of the people, to make public policy. . . . Courts should make policy . . . only when the body politic has not spoken. . . ." (internal quotation marks and citation omitted)).

{23} We also note that the situation faced by FAIR Plan insureds is likely not as dire as Maes portrays it to be. First, insureds will not be "at the utter mercy of the insurance companies," because they have the remedy provided for in Section 59A-29-6. We note

that Section 59A-29-6 could well cover some of the items of damage Maes claims, but we do not decide that issue because Maes never made a timely claim for them either to Audubon directly or in the proceeding before the Superintendent. Second, because the servicing insurer for the FAIR Plan bears no actual risk and earns no concomitant profits, it would have less incentive than insurance companies might ordinarily have to engage in bad faith practices in order to deny claims. Finally, even though we have decided that there is no private cause of action in the district court for bad faith punitive damages against the FAIR Plan's servicing insurer, other enforcement mechanisms are available. For example, the Insurance Code gives the Superintendent the authority to investigate insurers and to bring appropriate actions against them. *See, e.g.*, § 59A-29-4.

CONCLUSION

{24} We hold that Audubon is immune from suit under the circumstances of this case, and we reverse the district court's denial of Audubon's motion to dismiss.

{25} **IT IS SO ORDERED.**

/s/ Lynn Pickard
LYNN PICKARD, Judge

I CONCUR:

/s/ Celia Foy Castillo
CELIA FOY CASTILLO,
Judge

IRA ROBINSON, Judge (dissenting)

ROBINSON, Judge (dissenting).

{26} The Majority assumes that the Legislature made a compromise, whereby "property owners may obtain insurance when they might not otherwise be able to, and in addition, they are given a speedy administrative remedy including the opportunity for judicial review; in exchange, they are deprived of the right they would ordinarily have to sue their insurers for bad faith." (Majority Opinion, pg. 11, lines 4-8).

{27} I am afraid that this would be a rather bad compromise. What good is the property insurance if those who provide it to you can seriously harm you by exercising bad faith and you cannot get relief through the courts? Not a very good compromise. Not a very good trade-off, in my opinion. We would be sanctioning a system where property insurance companies would have no incentive to refrain from acting in bad faith.

{28} The Majority compares the trade-off between worker and employer in the workers' compensation statutes, citing *Morales.* That comparison fails because *Morales, Delgado* and the very recent case of

Salazar v. Torres, 2005-NMCA-127, ___ N.M. ___, ___ P.3d ___ [Vol. 44, No. 48 SBB 24 (Dec. 5, 2005)], *cert. granted*, No. 29,476 (Nov. 7, 2005), follow the trend that our Supreme Court set over the last several years. That trend began with *Delgado*, when the Supreme Court allowed a plaintiff worker to bring a tort action in court against an employer who acted with such a complete disregard for the worker's safety, that it wipes away the employer/insurer's immunity. *See also Salazar*, 2005-NMCA-127, ¶ 16 (stating that "the balance between the worker and the employer in the [Workers' Compensation] Act was designed for accidental events or acts, not willful or intentional acts"). Prior to *Delgado* and *Morales*, a worker could not sue an employer in court, but was trapped by the Workers' Compensation Act in an administrative review, even when the employer acted with malice.

{29} Let us assume that the Majority is correct in pronouncing Section 59A-29-7 clear and unambiguous. I, therefore, set forth the language of this statute again:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

Id.

{30} The Majority, in agreeing with Maes, states that "Audubon is not immune from suit in this case as a result of its being a member insurer." (Majority Opinion pg. 5, line 7). It further states that all of Audubon's actions "that are relevant to this case were undertaken in its capacity as the Plan's *servicing insurer,* not in its capacity as a *member insurer.*" (Majority Opinion, pg. 5, lines 5-6) (emphasis added)). I read Section 59A-29-7 where it provides immunity for "the association or its agents or employees" to mean the people who work for the association, not a servicing insurer.

{31} Nowhere in this clear and unambiguous statute do we find immunity from liability for a servicing insurer. The statute mentions a member insurer, but not a servicing insurer.

{32} Statutory provisions granting immunity from suit must be strictly construed. *See Armijo v. Dep't of Health & Env't,* 108 N.M. 616, 618, 775 P.2d 1333, 1335 (Ct. App. 1989); *see also Martinez v. City of Cheyenne,* 791 P.2d 949, 956 (Wyo. 1990), *overruled on other grounds by Beaulieu v. Florquist,* 2004 WY 31, 86 P.3d 863 (Wyo. 2004).

{33} The NMPIP Bylaws and Articles support a limited immunity interpretation of Section 59A-29-7. The NMPIP Bylaws provide indemnification to member insurers only as to their status as a member, or by reason of the insurer having personal representatives or employees serving on the governing

committee, other committee or subcommittee, or officer or employee of the NMPIP.

{34} Even the indemnification for officers and employees of the NMPIP is limited to actions taken in connection with the administration, management, conduct, or affairs of the Program or the Committee. Nowhere in the Articles or Bylaws is there a provision to provide indemnification to the member insurers for actions taken in their capacity as servicing carriers. That failure to provide indemnification is consistent with the notion that the Program is not liable for the servicing carrier's liability arising from the contracts it enters into with its insureds.

{35} In its Reply Brief, Appellant calls this argument a "*non sequiter* with a faulty premise" because "the Program pays all costs and expenses incurred by the Servicing Insurer, and all losses are borne . . . by the Member Insurers." Appellant finds no need for "an indemnification provision for the benefit of the Servicing Insurer, and the purported absence of one is irrelevant to the issue of immunity."

{36} This same logic could be used to find that there would be no need for indemnification language in the NMPIP Bylaws and Articles for member insurers in their capacity as a member, or having personal representatives or employees on the governing or other committees or officers of NMPIP.

{37} However, § 59A-29-7 already provides protection for these individuals or entities by granting them immunity.

{38} So, the language of the Bylaws and Articles demonstrates an intent to view member insurers differently than servicing insurers or carriers.

{39} It seems to me that immunity goes to the administrative matters and actions concerning the insurance pool or association, and not the matters of coverage. Audubon is neither an agent nor an employee of the NMPIP, the association set up under the Fair Plan Act.

{40} Audubon should not be immune from Maes' suit for bad faith insurance practices along with pre- and post-judgment intent. I would affirm the district court's denial of Audubon's motion to dismiss.

{41} I, therefore, respectfully dissent.

/s/ Ira Robinson
IRA ROBINSON, Judge

EIGHTH JUDICIAL DISTRICT
COUNTY OF TAOS
STATE OF NEW MEXICO

No.: D-820-CV-02003-00322

CORA MAES,

Plaintiff,

vs.

AUDOBON INDEMNITY INSURANCE GROUP, et al.,

Defendants.

ORDER DENYING MOTION TO DISMISS

(Filed Oct. 1, 2004)

THIS MATTER having come before the Court for hearing on July 9, 2004 upon the motion of Defendant Audobon Indemnity Insurance Group ("Audobon") to Dismiss Plaintiff's Complaint; and the Court having heard the arguments of counsel and reviewed the pleadings submitted and being otherwise fully advised in the premises, finds that the motion is not well taken and should be denied;

IT IS THEREFORE ORDERED that Defendant Audobon's ***Motion to Dismiss Claims*** be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendant Audobon's oral motion to allow an interlocutory appeal be, and the same hereby is, denied.

/s/ Sam Sanchez
DISTRICT COURT JUDGE

SUBMITTED:

/s/ Dennis T. Sánchez
Dennis T. Sánchez
Attorney for Plaintiff Cora Maes
PO Box 3273
Taos, New Mexico 87571
505-758-1327
APPROVED AS TO FORM:
HUFFAKER & CONWAY, P.C.

By: Approved telephonically 9/8/04
Ann M. Conway, Esq.
Attorneys for Audobon
P.O. Box 1190
Albuquerque, NM 87103-1190
505-244-0021

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

July 27, 2007

NO. 29,624

CORA MAES,

Plaintiff-Petitioner,

v.

AUDUBON INDEMNITY INSURANCE COMPANY,

Defendant-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing and brief in support thereof, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 27th day of July, 2007

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

N.M. Stat. Ann. § 59A-29-1. Short title

This article [Chapter 59A, Article 29 NMSA 1978] may be cited as the "FAIR Plan Act" (fair access to insurance requirements).

N.M. Stat. Ann. § 59A-29-2. Organization of FAIR plan and underwriting association

All insurers licensed to write and writing essential property insurance, as defined by the superintendent of insurance, in New Mexico on a direct basis are authorized, subject to approval and regulation by the superintendent of insurance, to establish and maintain a FAIR plan and to establish and maintain an underwriting association and to formulate and from time to time amend the plan and articles of association and rules and regulations in connection therewith and to assess and share on a fair and equitable basis all expenses, income and losses incident to such FAIR plan and underwriting association in a manner consistent with the provisions of the FAIR Plan Act [Chapter 59A, Article 29 NMSA 1978]. Such underwriting association shall be known as the "New Mexico Property Insurance Program."

N.M. Stat. Ann. § 59A-29-3. Participation

Each insurer authorized to write and writing essential property insurance in New Mexico shall be required to become and remain a member of the FAIR plan and the underwriting association and comply

with the requirements thereof as a condition of its authority to transact property insurance business. As a prerequisite to such authority to transact property insurance business each insurer shall automatically subscribe to the articles of agreement on file in the superintendent's office.

N.M. Stat. Ann. § 59A-29-4. Requirements of plan and authority of association

The FAIR plan and articles of association shall make provision for an underwriting association having authority on behalf of its members to cause to be issued property insurance policies, to reinsure in whole or in part any such policies and to cede any such reinsurance. The plan and articles of association shall provide, among other things, for the perils to be covered, geographical area of coverage, compensation and commission, assessments of members, the sharing of expenses, income and losses on an equitable basis, cumulative weighted voting for the governing committee of the association, the administration of the plan and association and any other matter necessary or convenient for the purpose of assuring fair access to insurance requirements.

N.M. Stat. Ann. § 59A-29-5. Changes in plan or articles

The governing committee of the New Mexico property insurance program may, on its own initiative or at the request of the superintendent of insurance, amend the plan and articles, subject to approval by the superintendent.

N.M. Stat. Ann. § 59A-29-6. Appeals; judicial review

A. A person aggrieved by an action or decision of the administrators of the FAIR plan or the underwriting association or of any insurer as a result of its participation may appeal to the superintendent within thirty days from the date of the action or the decision. The superintendent shall, after hearing held upon thirty days' written notice, issue an order approving the action or decision or disapproving the action or decision with respect to the matter that is the subject of appeal.

B. All final orders and decisions of the superintendent shall be subject to judicial review in the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

N.M. Stat. Ann. § 59A-29-7. Immunity

There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or

employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act [this article]. The meetings, activities, recommendations and decisions of the governing committee of the association as required or permitted in that act shall not be open to public inspection, nor be considered public documents, nor be subject to Sections 10-15-1 through 10-15-4 NMSA 1978.

N.M. Stat. Ann. § 59A-29-8. Repealed

NOTES:
STATUTORY NOTES

REPEALS. – Laws 1993, ch. 115, § 1 repeals this section, as last affected by Laws 1985, ch. 61, § 8, relating to the termination of the fair access to insurance requirements.

N.M. Stat. Ann. § 59A-29-9. Retroactive application

The FAIR Plan Act [Chapter 59A, Article 29 NMSA 1978] shall be effective and shall apply retroactively to April 30, 1981, to validate action taken under the New Mexico interim uniform basic property insurance and placement program promulgated by the superintendent of insurance.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CORA MAES,

Plaintiff-Appellee,

vs.

AUDUBON INDEMNITY INSURANCE GROUP, et al.,

Defendant-Appellant.

Sup. Ct. No. 6/29624
Ct. App. No. 25,298

AUDUBON INDEMNITY INSURANCE GROUP'S MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR REHEARING

Eighth Judicial District Court
County of Taos, State of New Mexico
The Honorable Sam B. Sanchez,
District Judge, Presiding

(Filed Jul. 2, 2007)

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Attorneys for Audubon Indemnity Insurance Group

Defendant/Respondent Audubon Indemnity Insurance Group ("Audubon"), by and through its counsel of record, Miller Stratvert P.A. (Ann Maloney Conway

and Deron B. Knoner), pursuant to Rule 12-404 NMRA, hereby submits its Memorandum Brief in support of its Motion for Rehearing of the Court's Opinion filed June 15, 2007. Audubon seeks rehearing by this Court solely to request remand to the district court to hear evidence on the relationship between Audubon and the New Mexico FAIR Plan/ New Mexico Property Insurance Program ("NMPIP"), and to make the factual determination of whether Audubon, acting in its role as the Servicing Insurer on Plaintiffs policy of insurance, was acting as the agent of the NMPIP so as to be entitled to immunity under NMSA 1978 § 59A-29-7.

Audubon seeks remand because the Court's holding that "Audubon, as a Servicing Insurer of the NMPIP, is not an agent of the NMPIP," [Opinion, Page 16], was reached without the benefit of a full factual record on the issue of agency. Instead, because the matter came to the Court from a motion to dismiss, the only evidence that was before the Court consisted of the Bylaws and the Articles of Association of the NMPIP, which were attached by Plaintiff to her response to Audubon's Motion to Dismiss, together with the affidavit of Ted Knight that was introduced by Audubon in its reply brief. While the Court found this evidence insufficient to establish that Audubon served as the agent of the NMPIP, substantial relevant evidence exists on the issue of agency as defined by the Court, and remand is necessary to allow Audubon to present that evidence to the district court. Without remand, Audubon would be

deprived of the right to present this evidence, and would thereby be deprived from asserting its statutory grant of immunity under § 59A-29-7, solely because of the unique procedural history and posture of this case.

PROCEDURAL HISTORY

On June 14, 2004, Audubon filed its Motion to Dismiss based on Audubon's claim of immunity based on its status as a member insurer under the FAIR Plan Act taking actions in performance of its powers and duties under the Act. In her response to that Motion, Plaintiff attached materials outside the scope of the pleadings (specifically the NMPIP Bylaws and Articles of Incorporation), and argued that the motion should be treated as one for summary judgment and should be denied because the actions of Audubon allegedly were not in performance of its powers and duties under the FAIR Plan Act, or were outside the scope of its powers and duties under the Act. In response, Audubon argued that, as shown by the Bylaws and Articles introduced by Plaintiff, Audubon was the agent of the NMPIP as agency was defined in U.J.I 13-401. The only evidence Audubon introduced at that point was the affidavit of Ted Knight, who specifically averred that the actions Audubon had taken with respect to Plaintiff were in performance of its powers and duties under the FAIR Plan Act (an issue that this Court did not reach in light of its finding that Audubon was not the agent of the NMPIP).

While Audubon's argument before the District Court, and indeed before the Court of Appeals and this Court, had been that, as defined in U.J.I. 13-401, Audubon was the agent of the NMPIP at all times relevant to Plaintiff's Second Amended Complaint, this Court clarified in its Opinion that U.J.I. 13-401 does not provide "the full picture of the nature and formation of the agency relationship for all purposes." [Opinion, Page 10.] This Court went on to emphasize the fiduciary nature of the agency relationship, and found that the Bylaws and the Articles did not "evince the control necessary to form or constitute an agency relationship." [Opinion, Pages 10-11.] The Court also held that from its reading of the Bylaws and the Articles, "the requisite control does not exist nor does any textual basis from which we can imply a principal-agent relationship between the NMPIP and Audubon," [Opinion, Page 12.] Finally, the Court held that "[t]he decisions of which Maes complains, i.e., whether or not to pay her claim, were reserved to Audubon, not to the NMPIP." [Opinion, Page 13.]

GROUNDS FOR REMAND

The Court's findings were based on the Bylaws and Articles of Organization of the NMPIP. Because this matter came before the Court on a motion to dismiss based on Audubon's status as a member insurer under § 59A-29-7, Audubon did not seek to introduce evidence which would have demonstrated the full degree of control exercised by the NMPIP over Audubon, and specifically the control which the

NMPIP exercised over the decision to pay or deny Plaintiff's claim under her FAIR Plan policy issued and serviced by Audubon in its role as the NMPIP's Servicing Insurer. Audubon respectfully submits that should this evidence be introduced, it will demonstrate that "the requisite control" of Audubon by the NMPIP did exist to establish the principal-agent relationship, and that the decisions of which Maes complains were reserved to the NMPIP, not Audubon.

Should this Court order a remand to the district court for further consideration in light of the Court's Opinion of whether evidence exists to demonstrate that Audubon was the agent of the NMPIP for purposes relevant to § 59A-29-7, Audubon expects to be able to show the following:

- As of June 15, 2000, the NMPIP was involved in the handling of Plaintiff's claim along with Audubon.
- That Audubon forwarded the claim to counsel for handling at that time at the instruction of the NMPIP.
- That the NMPIP was involved in the decision to deny Plaintiff's claim, which denial was contained in the letter of August 3, 2000 from attorney Cynthia Braun to Plaintiff's counsel.
- That all actions taken by Audubon, including the decision to file a declaratory judgment action in federal court, the decision to advise Plaintiff of her right to an administrative appeal of her claim, the decision to appeal

the decision of the Superintendent, the decision to pay Plaintiff's claim in the amount of policy limits following that appeal, and the decision to litigate the issues in this case were taken by Audubon with the approval of and at the direction of the NMPIP.

- That the final decision to pay Plaintiff's claim was made by the NMPIP, not by Audubon.
- That Audubon's role in handling Plaintiff's claim was limited to investigating the facts and circumstances of her claim, and paying expenses relevant to the claim, subject to reimbursement by the NMPIP.
- That all decisions with respect to the Plaintiff's policy, including the decision to issue the policy, the decision to deny the claim, and the decision to seek resolution of the dispute first through the Superintendent of Insurance, and then through judicial review, were made by the NMPIP, not Audubon, or were subsequently ratified by the NMPIP if not pre-approved.
- That the Agreement dated January 1, 1999 between Audubon and the NMPIP in which Audubon is designated as the NMPIP's Servicing Insurer contains provisions which require Audubon to investigate all claims and settle or defend the same in accordance with the NMPIP procedures and by-laws, and allows the NMPIP to associate with Audubon in the defense of any claim and control the defense of any claim.

Again, Audubon respectfully submits that when this and other relevant evidence is presented to the district court, it will demonstrate that the NMPIP exercised the requisite control over Audubon to meet the test for agency delineated in the Court's Opinion, and it will demonstrate that the ultimate decision on payment of Plaintiff's claim was reserved to the NMPJP, not Audubon. As a result, Audubon believes it will show that Audubon is entitled to immunity pursuant to NMSA 1978 § 59A-29-7.

As the Court of Appeals has previously noted, when "the record on appeal generates doubt concerning the facts found or the law applied" by the trial court, it is appropriate for the appellate court to remand for reconsideration and allow the trial court to exercise its discretion." *See Lucero v. Yellow Freight Sys., Inc.*, 112 N.M. 662, 667, 818 P.2d 863, 868 (Ct.App.1991); *accord Bryant v. Lear Siegler Mgmt. Servs. Corp.*, 115 N.M. 502, 511, 853 P.2d 753, 762 (Ct.App.1993); see also *State v. Ferguson*, 111 N.M. 191, 196-97, 803 P.2d 676, 681-82 (Ct.App.1990) (Hartz, J., dissenting) (explaining why it is significant for the trial court to articulate the basis of the exercise of its discretion and indicating preference for remand to enable the trial court to apply correct legal standard even though it may reach the same result).

Audubon respectfully submits that remand is appropriate not only where "the record on appeal generates doubt concerning the facts found or the law applied," it is paramount when no factual record exists because the parties considered the underlying

issue to be solely a legal issue, but where the appellate court's opinion turned strictly on a narrow factual issue. That is the situation in this case.

CONCLUSION

WHEREFORE, Audubon respectfully moves the Court to rehear this matter, and remand it to the district court for development of the record on the factual issue of whether the NMPIP exercised the requisite control over Audubon's actions in this matter to establish the principal-agent relationship, and thereby establish Audubon's immunity from Plaintiff's Second Amended Complaint under § 59A-29-7.

Respectfully submitted,

MILLER STRATVERT P.A.

/s/ Ann Maloney Conway

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CERTIFICATE OF SERVICE

I CERTIFY SERVICE of a true copy of the foregoing, via U.S. Mail with sufficient postage, as follows:

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Dennis T. Sanchez
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Attorney for Cora Maes

on this 2nd day of June, 2007.

for /s/ Ann Maloney Conway

EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF TAOS
STATE OF NEW MEXICO

CASE NO: 03-322-CV

CORA MAES,

Plaintiff,

vs.

AUDUBON INDEMNITY
INSURANCE GROUP, et. al,

Defendant.

TRANSCRIPT OF PROCEEDINGS

On the 9th day of July, 2004, this matter came on for hearing on MOTION TO DISMISS before the HONORABLE SAM SANCHEZ, Judge of the Eighth Judicial District, State of New Mexico, Division II.

The Plaintiff, CORA MAES, appeared by Counsel of Record, DENNIS SANCHEZ, Attorney at Law, P.O. Box 3273, Taos, NM 87571-3273.

The Defendant, AUDUBON INSURANCE, appeared in by Counsel of Record, ANN CONWAY, Attorney at Law, P.O. Box 1190, Albuquerque, NM 87103-1190.

At which time the following proceedings were had:

[2] THE COURT: This matter before the Court is styled *Cora Maes* as plaintiff versus *Audubon Indemnity Insurance Group, Brown and Brown of*

New Mexico Inc., a New Mexico Corporation, doing business as Polson Mercer, Brown and Brown, and Brown and Brown, Inc., in New Mexico doing business as Brown and Brown Insurance Inc., a Florida Corporation, doing business as Polson Mercer, Brown and Brown. Those are the defendants. This is in the 8th Judicial District Court, county of Taos, Cause No. 2003-322-CV.

This is before the Court on a motion to dismiss. Are the parties ready?

MS. CONWAY: Yes, your Honor.

MR. SANCHEZ: Yes, your Honor.

THE COURT: You may –

MR. SANCHEZ: Your Honor, for the record, Polson Mercer and Brown and Brown have been dismissed out of the case.

THE COURT: Okay.

MR. SANCHEZ: So the only parties are Audubon Insurance and of course the plaintiff, Maes, in this case.

THE COURT: Okay. You may proceed with your argument on the motion to dismiss.

MS. CONWAY: Thank you, your Honor. My [3] name is Ann Conway and I represent Audubon in this case. Audubon acts in this case as the service and carrier for what is called the New Mexico Fair Plan. This is a statutory plan that was created by the New

Mexico Legislature to create in essence a pool of insurance for people who are unable to get insurance in the regular market.

Every insurance company who is licensed to transact property insurance in the State of New Mexico is required to become a member of the Fair Plan and it's underwriting association, which is New Mexico Property Insurance Program. Those terms are used interchangeably.

Once they are a member, as is required by law, they are subjected to assessments to fund this pool for insurance outside the regular market.

This particular – in this particular case, Ms. Maes applied for insurance with the New Mexico Property Insurance Program in March of 2000. She was issued a policy, there was a fire loss in May of 2000, and after the investigation, there was a dispute between the Fair Plan acting through its service and carrier, Audubon, a coverage dispute.

The Fair Plan has, by statute, a statutory scheme for resolving claims.

When the claim was denied, we advised Ms. Maes that she could appeal that decision to the superintendent of [4] insurance as is provided for by law. Which she did.

A full evidentiary hearing was held before the superintendent of insurance, and the superintendent issued an – an order saying that there was coverage in this particular case.

That was appealed to the district court, again, as is provided in the statute, and the district court affirmed the decision of the superintendent of insurance.

At that point and time, Audubon paid its policy limits to the plaintiff.

Those are the procedures that are set out in the statute for claims made under the Fair Plan. Again, through Audubon as the servicing carrier for the Fair Plan.

The Fair Plan Act provides in Section 59 A 29-7, "There shall be no liability on the part of, and no cause of action in any nature shall arise against any member in the Association, or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the Fair Plan Act." Which is exactly the case here.

The plaintiff has argued, first, that Audubon is not a member insurer.

That is contrary to the expressed provisions of the Fair Plan Act which are found in section 59 A-291 et. seq.

[5] In other words, if Audubon is writing property insurance in New Mexico, which is undisputed, it has to be by law a member company.

There's – there's a comment made in the response brief that they have no way of knowing whether it's a

member – a member company, but by law it has to be, it's not disputed that they write property insurance in New Mexico.

More importantly, however, Audubon is also acting in this case as the servicing carrier, which is also provided for in the act.

The Fair Plan itself is a very, very small operation and it contracts with Audubon to issue the policies to service them, to handle the claims such as was in the case – in this case.

The only thing it doesn't do is underwrite the policy. That decision is made by the Fair Plan itself. And then they – they okay that and Audubon takes over and acts as the Fair Plan's agent in servicing that policy and handling claims, if they arise.

And that's how it was acted in this case. So it clearly falls within this statutory immunity provision.

If you look at other statutes in New Mexico granting immunity, I think that they are – are in accord. For instance, Worker's Compensation is an exclusive remedy, there's immunity on punitive damages in accordance with that [6] act. That's because employers are required to have insurance. In this case, you have a situation where you don't have a voluntary market where you have a – a private insurance company who is out soliciting insured, hopefully making money and doing business.

In this case, it's a nonprofit company, it's statutorily created, and rather than being a benefit to the

insurers, it's something they're obligated to do whereby they pay assessments to cover any of the losses that occur on these Fair Plan policies.

The plaintiff also makes the argument that the – the servicing carrier, Audubon, was not acting within the scope of its powers and duties under the Act.

There's no – there's no cite to any authority for that. In fact, the response brief does not meet the requirements of Rule 58. There's – there were no affidavits or sworn statements in the response.

But, the – but this assertion is unsupported, there is no exception in the language that I've quoted to the Court for punitive damages. And there's clear case law in New Mexico to cite in our brief that if the Court – if the legislature wishes to make an exception, it will do so. And one should not be read into unambiguous language in a contract.

And so for these reasons, your Honor, we would [7] respectfully request that our motion be granted.

THE COURT: Mr. Sanchez?

MR. SANCHEZ: Thank you, your Honor. Your Honor, I'm here on behalf of Cora Maes in this case. And this case involves a fire that happened in Arroyo Seco, New Mexico, I'm sure the Court's aware of that building, that's right across from the Arroyo Seco school house.

At this point that property is fenced up, my client is living in low income housing because of the fact

that Audubon Insurance has failed to pay the premiums – I mean, pay the policy after my client paid the premiums on this property.

To go back a little bit, what happened in this case initially, my client filed her claim for the fire which was caused in house 149 State Road 150, which was written on the contract, done by the agents, the contract was prepared by the agents for Audubon Insurance company, a Florida Corporation.

We're not here suing them as them as members of any Fair Plan Act. We're suing them as Audubon Insurance company, the company that insured Cora Maes in the event that she suffered any kind of liability, any damage to her property, and that's exactly what happened.

They interviewed here her, they sent an adjustor down, that insurance was taken down. We get a letter [8] denying the claim.

I then threatened a lawsuit. I said, "We're suing you for bad faith, we're suing for breach of contract." Cynthia from Ms. Conway's office, indicated that maybe we could resolve the case. I said, "well, let's do that." Next thing, there's a complaint for declaratory judgment in federal court, which is filed by Audubon Insurance by Cynthia, Vaughn and Conway.

So, that's the reason my complaint was never filed.

They then wrote back to my office asking whether we'd be interested in going through the

pr[illegible]lure in the Fair Plan Act which said that we could apply to the superintendent of the insurance.

It wasn't mandatory under the Act. We want to participate, we said, sure. My client needed her money right away. We went ahead, went through a hearing before the superintendent of insurance, for I think it was three or four days of hearing. The hearing officer determined that there was coverage for the property at State Road 150, house 149, 148, I believe.

They then appealed that to the superintendent of insurance, he affirmed the hearing officer's decision.

Thereafter, they appealed to district court, Judge Carol Vigil affirmed the decision saying there is [9] coverage.

I heard back from Audubon Insurance later indicating that they were voluntarily paying this money. There was nothing voluntary about it. We – we have been fighting tooth and nail trying to get them to pay the money. Finally they did pay the measly 150,000 that there was in coverage.

My client's property is – to rebuild it, it's over $300,000. The money was paid, they then refused to pay interest on the money that they held for approximately three years.

At that point, we decided to go ahead and file for the interest, and we filed a bad faith claim. That's the case that's before this Court.

The citation of Ms. Conway is 59A-29-7. It deals with immunity. And, your Honor, that has nothing to do with – with this case. I mean, anybody who sells essential property insurance in New Mexico is required to become a member of the Fair Plan. And let me read the statute to the Court.

States that, "There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative, or for any action taken by them in the [10] performance and their powers and duties under the Fair Plan Act."

We're not suing them as members of the – under the Fair Plan Act. We're suing them as a service carrier for the Fair Plan Act.

In other words, they sell insurance, but they're required to be members of – of the Fair Plan.

I would cite to the Court section 59A-29-3, where it states, "A member insurer is defined as an insured – insurer authorized to write and writing essential property insurance in New Mexico." That although not a matter of record in this case, Audubon is required, pursuant to the bylaws of New Mexico Property Insurance Program.

The only duties of such a member insurer are number one, to become and remain a member of the Fair Plan, and the underwriting association, and comply with the requirements thereof.

And number two, to subscribe to the articles of agreement on file in the superintendent's office.

So, we're not suing them in the capacity of members of the Fair Plan Act. Anybody who comes into New Mexico is – has got to become a member, that's a requirement.

Which basically what I wanted to say is, you know, Florida corporations, California corporations, they can come into New Mexico, they can deny claims, and they can't be [11] sued. And that clearly is not the law.

My client is owed money for her interest, the bad faith that Audubon has shown throughout this case, This motion is totally frivolous. There is no basis in law for this.

The fact that a Florida corporation comes and says, "We're immune like the State of New Mexico government, unless you can sue us by authority of legislature." That's not the law in New Mexico, your Honor.

The second point that even if the provisions of 59A-29-7 were applicable to Audubon, it's still not protected, because any of the of actions and conduct by Audubon have been beyond the scope of anything they could have done under the Fair Plan Act.

Basically what they're saying, "Even if we act in bad faith, we deny claims, you have no basis to bring a lawsuit against us." And that clearly is not the case, your Honor.

They're not being sued as a member of the Fair Plan Act, they are being sued as a service carrier, an insurance company and we would – out of state insurance company, and we would ask that the motion to dismiss this case be denied.

Briefly, your Honor, let me go ahead and read the property insurance contract's Fair Plan Act. 59 A-29-3 [12] basically states that, "Each insurer authorized to write essential property insurance in New Mexico shall be required to become and remain a member of the Fair Plan and Underwriting Association and comply with the requirements thereof as a condition of its authority to transact property insurance business."

So, any insurance that comes into New Mexico to sell property insurance is required to be a member. But they can't hide behind the immunity statute and say you can't sue us for anything we do, whether bad faith or not. Thank you, your Honor.

THE COURT: Any reply?

MS. CONWAY: Very briefly, your Honor. In the reply brief, there is an argument made that this should be treated as a motion for summary judgment. We don't agree. But as the Court knows, we have attached an affidavit of former deputy superintendent of insurance, a former and current board member of the Fair Plan. The department of insurance – is a member of the Fair Plan. They regulate it.

And I would just point to Paragraphs 8 and 12, if this is treated as a motion for summary judgment, wherein Mr. Night explains that they had an agreement as servicing carrier that Audubon has an agreement to issue and service policies on risks referred to it by the NMFIP at that time Audubon was a member insurer under the Fair Plan Act.

[13] And secondly, Paragraph 12, at all times relevant to this lawsuit, the actions of Audubon, the actions Audubon took in connection with the policy issued to Cora Maes were in performance of its powers and duties within the scope of the Fair Plan Act.

Those are the two critical undisputed material facts that entitle us to dismissal under the immunity provisions of the Act. Thank you.

THE COURT: Having heard the argument of Counsel and this motion to today, the motion for dismissal is denied. Mr. Sanchez, if you'll draft the order?

MR. SANCHEZ: Thank you, your Honor.

MS. CONWAY: Your Honor, may I request language for an interlocutory appeal?

THE COURT: It is denied.

(Note: Court in recess at 1:53 pm.)